

Missouri Attorney General's Opinions - 1948

Opinion	Date	Topic	Summary
1-48	Jan 27	ROADS AND BRIDGES.	County court cannot collect from special road district for repairs to bridge in such special road district; may assist special road district organized under Art. 10, Chap. 46, R.S. 1939, in maintaining bridges, such money to be paid out of class 6 of the budget; cannot pay for maintaining a bridge in a special road district organized under Art. 11, Chap. 46, R.S. 1939.
1-48	Jan 30	RECORDER. FEES.	Contents of annual report that the recorder shall make to the court of all kinds of fees received by him under Section 1, page 1526, Laws of 1945.
1-48	Feb 20	BONDS. COUNTY COURT.	Authority of county court to transfer money in general revenue fund to sinking fund for payment of interest and principal of bonds when same become due.
1-48	Sept 27	CONSERVATION COMMISSION. FISH AND GAME.	Employees of a resident state bait dealer cannot trap minnows under permit issued to employer.
1-48	Nov 15	ROAD DISTRICTS.	Residents of a special road district organized under Article 11, Chapter 46, R. S. Mo. 1939, cannot withdraw or detach themselves from the road district.
3-48	Feb 16	SHERIFFS. EXTRADITION. SALARIES AND FEES.	Sheriff cannot be paid mileage for travel beyond state for returning prisoner who has waived extradition. There is no requirement that the sheriff go beyond the state line for a fugitive.
3-48	Nov 24	ELECTIONS. STATE REPRESENTATIVES.	Where tie vote in election for state representative occurs and question arises concerning legality of several votes cast, the State House of Representatives may make final determination.
4-48	Jan 12	BONDS. COUNTY COURT. COUNTY TREASURER.	County court is prohibited by Sec. 26(a), Art. VI of Constitution, from becoming indebted exceeding in any year the income and revenue provided for such year, and contract between county and surety company for payment over 4 year term of premiums on county treasurer's bond, given for protection of school fund, does not bind county for more than one year. County court may in any year set bond required of treasurer for protection of school money.
4-48	Mar 15	SHERIFFS.	Several questions regarding salaries of sheriffs in counties of the second class.
4-48	Apr 6	MUNICIPALITIES.	Authority of City of Carthage to install parking meters around county

		COUNTIES. MOTOR VEHICLES.	square.
4-48	July 17	COUNTY ASSESSORS. SECOND CLASS COUNTIES. FEES AND SALARIES.	Fees earned by county assessors in second class counties for certifying copies of assessments of personal property, and merchants and manufacturers assessments on property taxable in a city to appropriate city officials may be legally retained by assessors in addition to salary provided by law, and need not be paid into the county treasury.
5-48	Jan 6	MAGISTRATE COURTS.	Magistrate must keep judgment docket; magistrate judgment not lien until transcript of judgment filed with circuit clerk.
5-48	Mar 10	MAGISTRATE COURTS.	Division No. 2 of the Magistrate Court of Nodaway County is a legally constituted court.
5-48	Mar 29	SPECIAL ROAD DISTRICTS. BONDS.	Special road district organized under provisions of Art. 18, Chap. 46, R. S. Mo. 1939, which issues bonds, may dissolve before such bonds are paid, and certification of amount necessary to pay such bonds is to be made by trustee, or, if he fails, by state auditor, and levy is made by county court.
5-48	Apr 27	ELECTIONS.	Sufficiency of petition for special election to establish Public County Health Center determined from petition as amended, but supplemental petitions not permitted.
5-48	June 25	ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS.	Special road district cannot be organized under Art. 18, Chap. 46, R.S. Mo. 1939, when all of territory in road district constitutes all or a part of a city of the fourth class. Funds of the road district arising from special road and bridge tax cannot be spent in incorporated towns or cities.
5-48	July 1	TAXATION. SALES AND USE TAX. MOTOR VEHICLES, ETC.	Sales and use tax under H.B. No. 258 of the 64th General Assembly is applicable to motorcycles and motorscooters; dealer who purchases car as demonstrator is subject to tax.
5-48	Sept 9	TAXATION. REVENUE.	Proceeds of use tax imposed by Paragraph (c) of Section 11412, Mo. R.S.A., to be credited to State Highway Department fund.
5-48	Nov 17	TAXATION. SALES TAX.	Sales of food and drinks at cafeteria owned by manufacturing company to employees of such manufacturing company are subject to the sales tax.
6-48	Feb 19	PUBLIC SERVICE COMMISSION. TAXICABS.	Certificate of Convenience and Necessity not required of persons operating "taxi-cabs" whose "principal operations" are within a city or suburban territory adjacent thereto.
9-48	Apr 27	Hon. Virgil H. Black	WITHDRAWN
9-48	Nov 15	TAXATION AND	Funds distributed to counties by state derived from Private Car Tax are

		REVENUE. COUNTY FUNDS.	placed in County General Revenue Fund.
9-48	Nov 26	COUNTY COURTS.	Refund from State to County to be credited to county fund from which warrant was issued, through error, to pay entire cost of road: Such sum can be used for road maintenance in year 1948 even though prior to the refund amount permitted by budget had been spent.
10-48	Mar 1	OPTOMETRY BOARD.	Validity of rules.
10-48	Mar 15	SHERIFFS.	Amount paid janitor for going after food at restaurant for persons confined in county jail and returning tray and dishes constitutes actual costs, as provided in Section 4, page 1563, Laws of Missouri 1945.
10-48	May 14	Hon. Fred C. Bollow	WITHDRAWN
10-48	June 29	OPTOMETRY.	Advertisement "prices are reasonable" not indirect advertisement of prices for optometric services within Section 10121 (G) R. S. Mo. 1939, as amended (Laws, 1947, p. 415).
10-48	June 30	SCHOOL BOARDS.	Member cannot contract in private capacity with board. (September 1964 – See statute 165.157, RSMo 1963 Supp. making, selling or providing commodities a misdemeanor.)
10-48	July 21	Hon. Robert L. Borberg	WITHDRAWN
10-48	Sept 10	COUNTY CLERKS.	The clerk of the county court in counties of the third class are authorized to select clerical help.
11-48	Jan 31	ELECTIONS. HOSPITAL.	The term "General Election" means the election held in November of even years. Trustees not nominated by primary elections: any qualified person may be placed on ballot.
11-48	June 8	MAGISTRATE COURTS. CRIMINAL PROCEDURE.	Warrant issued by magistrate and endorsed by county clerk may be served by sheriff of another county if endorsed by a magistrate of such county.
11-48	Oct 25	ELECTIONS.	All identifying numbers on ballot must be concealed by black sticker.
11-48	Nov 22	COUNTY HOSPITALS.	Restriction on number of trustees who may reside in town where hospital is located does not apply to trustees chosen at election.
12-48	Feb 20	TAXATION. SCHOOLS.	Authority to issue bonds for construction of schoolhouse carries with it the authority of directors to impose a tax for sinking fund and interest in addition to the rate for current purposes.
12-48	May 19	PROBATE COURTS.	Probate courts in this state have no power to commit a person under guardianship in said court because of habitual drunkenness to a state hospital or any other institution.

12-48	June 17	Hon. Joseph N. Brown	WITHDRAWN
13-48	Jan 21	TAXATION. SALES TAX.	Retail sales made by or to an educational institution supported by a religious organization are exempt from provisions of the Sales Tax Act.
13-48	Apr 12	INTOXICATING LIQUOR.	(1) Corporation or individual owner, as licensee of several retail stores or outlets licensed to sell intoxicants at retail, may purchase intoxicants, place the intoxicants in central warehouse or on licensed premise, and then distribute the intoxicants as needed to the various licensed stores or retail outlets belonging to this same corporation or individual owner. (2) The transfer of intoxicants from store to store, and between stores or outlets, all belonging to the same corporation or individual owner, as licensee, is not done in violation of the Liquor Control Act of Missouri, particularly Section 4913, R.S. Mo. 1939.
13-48	Apr 30	CONSERVATION COMMISSION FISH & GAME LAWS. CRIMINAL PROCEDURE.	Persons taking and possessing fish from private lakes are subject to prosecution unless they have obtained a Co. or State fishing permit, or the owner of said lake has obtained a game breeders permit and furnished such persons with a written statement as provided in Secs. 55 & 56, Wildlife & Forestry Code of Missouri.
13-48	May 7	BD. OF PROBATION & PAROLE.	(1) Board of Probation & Parole has authority under the law (Sec. 8992.39, Laws of Mo. 1945) to parole (release upon condition) an inmate of a correctional institution of the State of Mo., to the custody of the warden of a penal institution in another State or to the warden of a U.S. Penitentiary; (2) If an inmate is paroled to a detainer said inmate could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution and before the expiration of the Missouri sentence.
13-48	July 29	APPROPRIATION. REFUND.	Present claim for a refund may be assigned.
13-48	Aug 2	MAGISTRATES. JUSTICES OF THE PEACE.	Justices of the peace qualified for appointment as additional magistrate.
13-48	Nov 10	INSANE PERSONS.	Probate Court of County wherein a State Hospital is located does not have jurisdiction to pass upon the sanity of pay patient within such hospital unless they are residents of that county.
14-48	Oct 14	CORONERS.	If coroner is unable to take inquest, any magistrate, or judge of the county of record of the county may take the inquest.
15-48	Jan 17	RECORDER OF DEEDS. MARRIAGE.	Under Section 3364, page 640, Laws of Missouri, 1943, applications for marriage license must be presented and filed with the recorder of deeds that issues said license.

15-48	Apr 2	PENSIONS. SOCIAL SECURITY.	Necessary that recipients of old age assistance continue to be residents of the state in order to qualify.
18-48	Feb 2	COUNTY HIGHWAY COMMISSION.	The terms of members of County Highway Commission begin on the date of the appointment of the original commission by the county court, and thereafter, one commissioner should be appointed each year for a four-year term beginning on that date.
18-48	Feb 11	MAGISTRATE COURT.	Magistrate cannot require deposit for costs in all civil proceedings.
18-48	Apr 9	MAGISTRATE COURTS. MARRIAGE.	Magistrate can solemnize marriages in his county alone except under certain conditions.
18-48	Sept 13	SCHOOLS.	District must pay tuition of high school students outside the district. Parents liable for tuition when.
19-48	June 2	UNIVERSITY.	Matching of funds appropriated for construction of dormitories.
19-48	Sept 2	METROPOLITAN AREA PLANNING COMMISSION.	Method of procedure in creating obligations and paying expenses.
19-48	Dec 3	UNIVERSITY OF MISSOURI. PROPOSED VOCATIONAL SCHOOL AT CAMP CROWDER.	Proposed conveyance of real estate from Federal Government to Board of Curators of the University of Missouri for use as site for vocational school, restricting same to that use for twenty-five year period, providing for semi-annual reports to War Assets Administration, providing against sale of property within twenty-five years of date of deed without consent of the United States, and providing for reversion to the United States in the event of violation by the Board of Curators of certain restrictions would convey absolute fee simple title to the Board of Curators within the meaning of "An Act to establish a Missouri State Vocational School", Laws Mo. 1947, pp. 364-365.
20-48	May 21	CIRCUIT CLERKS. TRANSCRIPTS. FEES.	Circuit clerks may charge 10¢ per hundred words and figures for preparing and certifying the record proper, and 5¢ per hundred words and figures for inserting and certifying the bill of exceptions or abbreviated transcript of the evidence in cases on appeal to the appellate courts.
20-48	July 10	DRAINAGE DISTRICTS.	Merchantable timber growing in ditches of a county court drainage district may be sold by the county court and the proceeds credited to such drainage district.
20-48	July 16	Hon. Edward Cusick	WITHDRAWN
20-48	Sept 21	Mr. Marshall Craig	WITHDRAWN
24-48	Mar 1	STATE FAIR. APPROPRIATIONS.	Money cannot be expended by the State out of existing or proposed appropriations for the purchase of the Veterinary Building located on

			the State Fair Grounds.
24-48	Mar 22	TAXATION. SCHOOLS. ELECTIONS.	Tax levy voted to increase taxes for construction of new school building can be earmarked for construction of such building. Additional levy may be voted at subsequent election if necessary for construction of school building. Notice of purpose of increase and rate of increase is sufficient to earmark taxes received from such levy.
24-48	May 22	CONSTITUTIONAL LAW. MILK.	Illegal milk delivered to dairy products plant which has not been purchased by such plant may be colored with harmless coloring matter by agents of Department of Agriculture or any "A" or "C" grader licensed by said department. Sec. 14103, Laws of Mo. 1945, p. 83, is constitutional.
24-48	Sept 22	JURIES. PAYMENT OF BOARD BILL OF JURIES.	Board bills of juries in cases in which state is liable for costs should be submitted with the criminal cost bill and county court should not be billed for such expense.
24-48	Nov 16	INTOXICATING LIQUOR.	Intoxicating liquor in interstate commerce "across" the State of Missouri from Illinois to Oklahoma cannot be seized for not bearing Missouri revenue stamps.
25-48	Jan 22	SHERIFFS.	Sheriff is entitled to per diem provided in Section 13411, R.S. Mo. 1939, for attendance in courts of record. Fee is properly allowed to the sheriff and not to the deputy for the deputy's attendance.
25-48	Feb 9	HIGHWAY ENGINEERS. COUNTIES.	In counties having a population of more than 20,000 and less than 50,000 inhabitants where the county surveyor is ex officio highway engineer, under Section 8660, R.S.Mo. 1939, the county court may not appoint a county highway engineer prior to January 1, 1949, or until after expiration of term of office of such county surveyor or a vacancy exists in the office of county surveyor.
25-48	Mar 19	CHIROPRACTIC BOARD.	Applicant for license must make grade of 60 per cent in each subject, and 75 per cent average on entire examination.
26-48	Jan 29	MAGISTRATES.	Term of additional magistrate ends at next general election.
26-48	Feb 6	COUNTY TREASURER. HIGHWAY ENGINEER. SURVEYOR.	County treasurer elected in 1948 in township organization county serves 4 year term. County surveyor is to be elected in 1948, but by such election does not become ex officio highway engineer.
26-48	Oct 1	MOTOR VEHICLES.	Provisions of Motor Vehicle Safety Responsibility Act inapplicable to claim allowed in bankruptcy proceeding.
27-48	Feb 21	MAGISTRATES. STATE HIGHWAY PATROL. CRIMINAL LAW.	Members of the State Highway Patrol may execute warrants anywhere in the State of Missouri when directed to them for the arrest of persons for criminal offenses pertaining to the operation of motor vehicles upon the highways of this state.

27-48	Mar 10	CORPORATION FRANCHISE TAX.	Foreign corporation not required to pay Missouri corporation franchise tax in year of commencing business in the state.
27-48	May 11	TAXATION AND REVENUE.	Missouri State Tax Commission does not have authority to apportion "distributable property" of railroad company of similar public utility to public library districts.
27-48	June 29	AGRICULTURE. OLEOMARGARINE.	It is lawful to sell colored oleomargarine in the State of Missouri.
27-48	Aug 19	TAXATION AND REVENUE.	Foreign corporation not engaged in business in Missouri is not liable to Missouri franchise tax.
27-48	Nov 8	OFFICERS. TOWNSHIP COLLECTOR.	Township collector by changing his residence to another township does not thereby forfeit his office and may collect taxes in the township in which he is elected until he is removed.
27-48	Nov 29	TAXATION.	Corporation electing to file franchise tax return under Section 144, Laws of Missouri, 1943, page 410, is to be taxed upon total value of assets.
27-48	Dec 11	ROADS AND BRIDGES.	General road district in county under township organization may contribute funds to county court for construction of bridge over stream dividing township from another township within same county.
27-48	Dec 30	INSURANCE.	Approval of proceedings for increase of capital stock of Commonwealth Life and Accident Insurance Company.
30-48	Feb 24	DRAINAGE AND LEVEE DISTRICTS.	St. John Drainage and Levee District has implied authority to enter into assurances assuring the United States that it will maintain, after construction, the levee the construction of which is contemplated by the United States.
31-48	Mar 3	BAIL BONDS.	The clerk of the circuit court may fix bail and take a bond or recognizance where the defendant is under arrest or in custody after an information or indictment has been filed, and when court is not in session.
31-48	June 24	OFFICERS. SALARIES.	Circuit Clerk and Ex-officio Recorder entitled to additional compensation provided in Senate Bills 247 and 274, 64th General Assembly.
31-48	Nov 17	TAXATION. COUNTIES.	Counties may not exact a gasoline tax in the absence of specific legislation authorizing same.
33-48	Feb 18	CRIMINAL LAW. MOTOR VEHICLES.	Under reciprocal provisions, a resident of Michigan may operate a motor vehicle for a period of 90 days in any 1 year without registering same with the Commissioner of Motor Vehicles.
33-48	May 26	WORKMEN'S	Second Injury Fund provided for in Section 3707, R. S. Mo. 1939, and

		COMPENSATION. SECOND INJURY FUND.	amendments thereto, is liable for the payment of additional medical attention to an injured employee by special order of the Workmen's Compensation Commission, even though such employee is drawing regular payments from said Fund because of permanent total disability.
33-48	June 10	INHERITANCE TAX. EXEMPTIONS.	Proceeds of pension under the provisions of the Federal Retirement Act are exempt from inheritance tax.
33-48	June 10	ELECTIONS.	Where a person has duly filed for public office and within the proper time files a withdrawal of that candidacy, said person cannot subsequently file a withdrawal of the withdrawal.
33-48	June 29	WORKMEN'S COMPENSATION.	An employer, under the terms of Section 3707, Laws of Missouri, 1945, page 1998, must pay the sum of \$100.00 into the Second Injury Fund, where an employee suffers the total, permanent loss of the use of an eye, resulting from two accidental injuries.
33-48	Aug 2	EXTRADITION. SHERIFFS.	Sheriffs may retain expenses incurred as a messenger of the Governor in returning fugitive from another state or territory.
33-48	Sept 24	OFFICERS.	Incumbent public officer entitled to retain office until successor elected or appointed and qualified.
33-48	Oct 8	DIVISION OF WORKMEN'S COMPENSATION.	The Division of Workmen's Compensation may, under Sec. 3727, R.S. Mo. 1939, adopt and enforce rules of procedure in the administration of the Compensation Act.
33-48	Oct 22	Hon. James Glenn	WITHDRAWN
33-48	Nov 30	SHERIFFS.	Sheriff transporting veteran to veterans' hospital pursuant to order of probate court and paid 5¢ per mile by Veterans' Administration is not entitled to additional 5¢ per mile from county.
33-48	Dec 16	DOGS AS DOMESTIC ANIMALS WITHIN MEANING OF SEC. 4556, R. S. MO. 1939.	Dogs are domestic animals. Section 4556, R.S.Mo. 1939, is applicable to dogs as well as to the animals specifically mentioned therein.
34-48	Mar 12	CRIMINAL LAW. MAGISTRATES.	When several defendants jointly charged with a felony and one defendant disqualifies the magistrate at a preliminary hearing, that magistrate shall continue to examine other defendants. If, on the trial before a magistrate for a misdemeanor, it appear from evidence defendant should be put on trial for a felony, it is the duty of magistrate to dismiss the misdemeanor charge and proceed to have defendant charged with a felony in conformity with the statutes.
35-48	Jan 28	DUTIES OF PROBATION OFFICER.	Mentally deficient child ordered committed to state hospital by Juvenile Court in St. Louis should be taken to the hospital by the Probation officer rather than by the sheriff.

36-48	Mar 5	MAGISTRATE COURTS. FILING FEE.	Disposition of \$5.00 filing fee paid to the clerk of the magistrate court upon granting a change of venue.
36-48	Sept 23	VITAL STATISTICS. HOUSE BILL NO. 65.	Only information from records of clerks and recorders may be required by State Registrar.
37-48	Jan 14	OFFICERS.	Deputy sheriffs appointed by the sheriff in counties of third class under authority of Sec. 2, Laws of 1945, p. 1562, do not have a "term of office" and compensation of such deputies may be changed at any time by the circuit judge.
37-48	Jan 21	CITIES OF THIRD CLASS. ORDINANCES. DRUNKEN DRIVING.	City of third class has power to arrest, try and fine a person driving a motor vehicle while intoxicated within the limits of such city when an ordinance on such subject has been passed.
37-48	Feb 20	CHIROPODY.	Person advertising as "orthopedic shoemaker" and "foot appliance specialist" is engaged in practice of chiropody.
37-48	Apr 28	LIQUOR LAWS.	Sec. 4992, R.S. Mo. 1939, applies to the provisions of Art. 2, Chap. 32 in existence at the time said Sec. was enacted, and also applies to any provision of Art. 2, Chapter 32, enacted by the Legislature since the time of its enactment.
37-48	July 1	OFFICERS.	Offices of Judge of County Court and Member of the County Board of Education inconsistent.
37-48	Aug 6	STATE COLLEGES. BOARD OF REGENTS.	Vice President of Board of Regents should serve remainder of biennium upon death of President.
37-48	Nov 22	MOTOR VEHICLES.	Invalid's chair with gasoline motor not required to be licensed.
40-48	June 30	SCHOOLS.	Money may not be transferred from Building Fund to Incidental Fund.
41-48	Feb 5	TAXATION OF ACCOUNTS OF CREDIT UNIONS, H.B. 407, 64TH GENERAL ASSEMBLY. TAX RETURNS.	(1) It is mandatory under H.B. 407, 64th General Assembly, Laws Mo. 1947, page 236, for credit unions to file tax returns on calendar year basis. (2) Tax is to be computed on basis of dividends accruing at the end of the fiscal year occurring in the preceding calendar year. (3) Said H.B. 407 is unconstitutional, in so far as it provides for a 1947 tax based upon dividends declared on Sept. 30, 1946, which last mentioned date was prior to July 1, 1947, the effective date of said H.B., but is constitutional as to taxes for 1948 and succeeding years.
42-48	Feb 11	Hon. F. M. Horton	WITHDRAWN
42-48	Apr 1	TAXATION. SCHOOLS. MAGISTRATE	Cannot increase rate of taxation for school purposes at school meeting unless notice of such proposition is given. Warrant must issue forthwith when information filed unless defendant is voluntarily

		COURTS.	present at that time.
42-48	May 20	MAGISTRATE COURTS.	Magistrates cannot give instructions in civil cases.
42-48	May 24	APPROPRIATIONS.	That part of Sec. 3.040 of House Bill No. 449 of the 64th General Assembly appropriating \$100,000 for purchase, installation and operation of equipment necessary to administration of Permanent Registration Law does not authorize payment of any salaries out of such appropriation.
42-48	May 29	BLIND PENSIONS.	Construing Section 9457, page 1350, Laws of Missouri, 1945, relative to the payment of accrued unpaid balance upon the death of a recipient, to the legal representatives of such pensioner.
42-48	June 17	APPROPRIATIONS.	Members and secretary of Industrial Commission of Missouri are to be compensated for the period of July 1, 1948, to July 19, 1948, from funds appropriated under Sec. 4.270 of House Bill No. 450 of 64th General Assembly.
42-48	July 2	MAGISTRATES. MAGISTRATE CLERKS.	Magistrate may raise salary of clerk when assessed valuation is finally placed at higher level.
42-48	July 22	TAXATION. REVENUE.	Refund of Missouri Motor Fuel Tax may not be made to Veterans Administration from money appropriated under Section 3.060 of House Bill No. 172 of the 64th General Assembly.
42-48	Aug 10	APPROPRIATIONS.	Deficiency in sum appropriated under Sec. 2.093 of House Bill 448 of the 64th General Assembly to be prorated among all counties of the state.
42-48	Aug 19	COUNTY COURTS. ROADS AND BRIDGES.	County court does not have power to give a bridge on an abandoned county highway to a special road district in another county, nor does the county court have power to sell such bridge to a special road district in another county for a nominal consideration.
42-48	Sept 9	TAXATION. REVENUE.	Method of distribution of County Stock Insurance Fund.
42-48	Nov 16	COUNTY MEMORIALS.	State's contribution to county memorial to Monroe County approved; to Knox County disapproved.
42-48	Nov 29	CRIMINAL LAW.	Issuance of certified copy of judgment and sentence or "commitment" a mere ministerial act and errors therein may be corrected.
42-48	Dec 9	APPROPRIATIONS.	Attorney fee paid in connection with issuance of revenue bonds not "matching funds" within the meaning of an act found Laws of 1945, page 397, and an act found Laws of 1947, Vol. I, page 175.
42-48	Dec 21	CRIMINAL LAW AND	Costs for issuing search warrants to agents of the Conservation

		COSTS.	Commission.
42-48	Dec 27	WITNESSES.	Wife is competent witness against husband for failure to support wife and minor child. Same when wife is divorced.
43-48	June 18	TAXATION.	Dirt moving and hauling machinery used by foreign corporation contractor in work on railroad in Iron County, if present on January 1st, is taxable in Iron County.
43-48	June 22	TAXATION. ASSESSORS. COUNTY COURTS.	County court may not control the county assessor in determining the assessment lists of personal property which he will make.
44-48	Mar 15	LABOR.	Division of Industrial Inspection does not have authority to make or promulgate rules and regulations.
45-48	Feb 19	INSURANCE- REINCORPORATION OF COMPANIES.	Insurance companies organized under the provisions of Art. III, Chapter 37, R.S. Mo. 1939, may reincorporate under the provisions of Art. IV, Chapter 37, R.S. Mo. 1939, to make insurance on the stipulated premium plan.
45-48	Mar 10	INSURANCE.	It is not mandatory for insurance companies or associations doing business on the stipulated premium plan, under section 5885, Article IV, Chapter 37, R. S. Mo. 1939, to obtain an application for insurance before issuing the policy, or to attach an application to a policy when issued.
45-48	Apr 22	MUTUAL INSURANCE COMPANIES ORGANIZED UNDER ARTICLE 7, CHAPTER 37, R. S. MO. 1939.	Such companies under H.B. 498, may write multiple insurance lines, including fire insurance and thereby are subjected to all of the provisions of Article 8, Chapter 37, R. S. Mo. 1939.
45-48	Apr 23	INSURANCE COMPANIES ORGANIZED UNDER ARTICLE 7, CHAPTER 37, R. S. MO. 1939.	Insurance companies organized under Article 7, Chapter 37, R. S. Mo. 1939, may issue a policy on personal property, known as a "floater" policy that might involve loss by fire in transportation.
45-48	Oct 12	LIFE AND ACCIDENT INSURANCE.	A domestic life or accident insurance corporation may, under the terms of Section 5886 and Section 5894, Article 4, Chapter 37, R.S. Mo. 1939, reincorporate to carry on insurance on the stipulated premium plan. The direction and handling of the business of such reincorporated insurance company must be done and performed by the board of directors of the reincorporated company.
46-48	Jan 2	APPROPRIATIONS.	Compensation of members of the Public Hearing Panel, under House Bill No. 180, should be paid out of the appropriation of the State Board of Mediation.

46-48	Jan 13	BARBER BOARD.	Person attending approved out-state school entitled to receive credit for education in applying for license to barber.
46-48	Jan 14	BOARD OF MEDIATION.	Board of Mediation has no jurisdiction in labor disputes between municipally owned public utilities and their employees.
46-48	Aug 14	ELECTIONS. COMPENSATION.	Clerks and judges of election and clerks employed by the day by the Board of Election Commissioners of St. Louis County are entitled to statutory compensation for each calendar day actually worked.
46-48	Nov 19	OFFICERS.	Deputy county clerk in fourth class county may also serve as county highway engineer.
47-48	Jan 21	INHERITANCE TAX.	When by reason of death of one co-owner of an estate by the entirety in either real or person property, the survivor acquires the whole estate therein, the property is not subject to assessment of inheritance tax. When by reason of the death of one co-owner of property, real or personal, held by two or more persons as joint tenants, acquires the interest of the deceased by reason of surviving, such property is not subject to assessment of inheritance tax.
48-48	June 1	PROBATE JUDGE. MAGISTRATE.	Lawyer must reside in county sixty days to qualify for the office of probate judge and ex officio magistrate.
48-48	Aug 19	Hon. Esco V. Kell	WITHDRAWN
49-48	Jan 6	COUNTIES. FARM TO MARKET. COUNTY BUDGET ACT.	The county court may anticipate the state aid for farm to market roads in its budget.
49-48	Jan 28	COUNTY BUDGET.	In counties of second class money collected by county collector in December and turned over to county treasurer in January of succeeding year may be carried forward in budget as "cash surplus." County treasurer is not authorized to set up separate cash fund from previous years and refuse to pay warrants of current fiscal year from such fund.
49-48	Nov 15	FURNITURE MANUFACTURERS MUST KEEP RECORD PROVIDED IN SECTION 4543.	Furniture manufacturers who buy trees or parts of trees for manufacture into timber products are required to keep a record as provided in Section 4543, R.S. Mo. 1939 including the section, township, and range of the county from which such timber was cut and taken.
51-48	Feb 10	SCHOOL DISTRICT FUNDS.	Four questions, funds, transportation, distribution of funds, school board district liability.
51-48	Mar 12	MAGISTRATES. NEPOTISM.	Magistrate is not in violation of the nepotism law by the county court appointing his sister to assist him under Section 21, page 241, Laws of

		COUNTIES.	Missouri, 1947.
51-48	Apr 9	OFFICERS. UNIVERSITY. PROFESSORS.	Professor who accepts royalty checks for books used in the University violates Section 10811.
51-48	Apr 16	INSURANCE. TAXATION.	Personal property in the office of a farmers mutual insurance company is taxable in this State.
51-48	Oct 27	COUNTY HOSPITALS.	Trustees of County Hospital formed under provisions of Article 4, Chapter 126, R. S. Mo. 1939, as amended Laws 1945, cannot bring suit or be sued as such but actions pertaining to such hospitals must be brought in the name of the real party in interest-the County.
51-48	Dec 3	PROBATE JUDGES.	Salary in counties with population from 30,000 to 70,000 determined by assessed valuation of real and tangible personal property and value of intangible personal property not included.
53-48	Mar 10	PUBLIC HEALTH AND WELFARE. CANCER COMMISSION.	Final administrative authority of Cancer Hospital is Director of the Department.
54-48	Mar 31	PUBLIC HEALTH AND WELFARE.	Deputy administrator of Food and Drug is subject to the Merit System Act.
56-48	Mar 4	Mr. Frank C. Mann	WITHDRAWN
57-48	Jan 15	PROSECUTING ATTORNEY.	Where a Missouri statute fixes the salary of the county officer on the basis of population of the county and provides no method of determining such population, the population is to be measured by the last decennial census of the United States.
57-48	Mar 10	PUBLIC HEALTH AND WELFARE. CANCER COMMISSION.	Final administrative authority of Cancer Hospital is Director of the Department.
57-48	Mar 12	BAIL. CRIMINAL LAW. CIRCUIT COURT.	Authority of prosecuting attorney and circuit court to relieve sureties on bail bond when defendant fails to appear.
57-48	Mar 13	SCHOOLS.	In prosecuting an action for violation of Compulsory Attendance School Law, information must be filed.
57-48	May 13	SHERIFFS.	Sheriff in third class county is not authorized to charge county for incidental services supplied prisoners.
57-48	May 17	CRIMINAL COSTS.	County court liable for costs accruing as a result of a criminal complaint filed by individuals other than officer where accused is not arrested.

57-48	June 3	TAXATION. MERCHANT'S TAX.	Farmers who hatch chickens or buy baby chicks and raise such chickens and ship them to market are not "merchants," and such chickens as they own should be assessed as personal property on Jan. 1st of each year. Farmers who raise minks and sell pelts and breeding stock are not "merchants," and should be assessed Jan. 1st of each year on value of minks owned at such time.
57-48	Sept 9	CHATTEL MORTGAGES. RECORDER OF DEEDS.	When recorder shall file or record a chattel mortgage.
57-48	Nov 18	JURY.	Board of jury commissioners may determine number of jurors to be selected from each township for jury panel.
57-48	Dec 21	MAGISTRATE COURTS. JUDGMENTS. JUSTICE OF THE PEACE.	No fee is allowed the magistrate in a proceeding to revive a judgment of the justice of the peace court the record of which was delivered to the magistrate.
58-48	July 28	Hon. Oral H. McCubbin	WITHDRAWN
59-48	Mar 17	Hon. L. Clark McNeill	WITHDRAWN
59-48	Mar 19	GRAIN WAREHOUSE ACT.	Public warehouseman in Missouri who has published schedule of rates for storage of grains under Sec. 24, Laws 1941, p. 373, and is operating under a warehouse license in this state, cannot discriminate between customers and cannot deviate from published schedule as to period of free time or any other charge. Mill operating in Missouri which is not licensed can accept grain for storage if it falls within the definition of "local public warehouse"
59-48	July 9	Hon. L. Clark McNeill	WITHDRAWN
59-48	Nov 24	COUNTY SCHOOL FUND.	Proposal to liquidate carried where receives majority of votes cast both for and against proposal.
59-48	Dec 3	GRAIN AND WAREHOUSE.	Operator of elevator storing grain for United States government requesting and obtaining state inspection must obtain state license. Name of each elevator should be shown on state license. License should be displayed in office room of elevator building. It is optional with local public warehouseman whether or not he secures state license. State warehouse receipt may be issued only by licensed public warehouseman on form approved by commissioner. Registrar must be appointed at each place where licensed public warehouse is situated.
60-48	Apr 29	TAXATION. ASSESSORS.	Assessor's duty to extend tax on omitted property in previous years, not county clerk's duty.

60-48	June 15	TAXATION. ASSESSORS.	Where county assessor resigned before May 31st and did not make verification of assessor's books, and successor did not qualify until June 10th, verification by affidavit of assessor's books is not required to make valid assessment.
60-48	Sept 28	ELECTIONS.	At a general election a voter may "write in" the name of any person he chooses for any office he chooses without regard to whether or not there is a regular party nominee. The person receiving the majority vote for any particular office is the person elected to said office.
62-48	Jan 6	ELECTIONS.	Canvass to be made after all intermediate registrations as provided for in Section 11872 of the Revised Statutes of Missouri for 1939, discretionary with the Board of Election Commissioners.
62-48	Jan 15	COUNTY COURT. COUNTY CLERK.	County court may not pay county clerk compensation for acting as agent for county in making contracts under the King-Thompson road bill.
62-48	Mar 15	COUNTY LIBRARY DISTRICTS.	Dissolution of district not authorized under Section 14767.
62-48	Apr 23	COUNTY BUDGET.	Appropriation for Ripley County Farm Bureau ordered to be made by Circuit Court, should be included in Class 4 of budget, and if there are insufficient funds in Class 4 to pay all approved estimates of said class, such funds should be apportioned to each office in proportion to the approved estimates of each office in Class 4. County Court cannot reduce estimated expenditures for Circuit Court expenses below 1946 and transfer such amount to Class 4 for County Farm Bureau.
62-48	May 20	COUNTY LIBRARY.	Qualified voters of a city having a tax-supported free library may not vote on the question of becoming a part of a free county library system at the same time the county votes on the establishment of a county library system.
62-48	June 4	COUNTY COURT. COUNTY FUNDS.	Money raised under tax levy ordered by circuit court for erecting a jail must be deposited in county depository and cannot be invested in United States Government Bonds.
62-48	June 11	OFFICERS. PROFESSORS. UNIVERSITY.	Section 10811, R. S. Mo. 1939, is not violated by professors who assign the royalty payments to organizations whereby personal gain does not inure to the professors.
62-48	Sept 20	Miss Kathryn P. Mier	WITHDRAWN
62-48	Sept 22	AUCTIONEER. REAL ESTATE BROKERS.	Auctioneer's license required to sell real estate at public auction, but licensed auctioneer not required to obtain real estate broker's license for such sales.
63-48	June	PENSIONS.	Probate court may waive statutory fees in guardianship proceedings for

	11	PROBATE COURT.	applicants or recipients of old age assistance.
63-48	Sept 3	Mr. H. H. Mobley	WITHDRAWN
64-48	Feb 5	CREDIT INSTITUTIONS TAX ACT. TAX RETURNS.	Tax returns under act must be filed on calendar year basis rather than fiscal year basis, and must be computed on basis of income for preceding calendar year.
64-48	Mar 22	CONSTITUTIONAL LAW AND SCHOOLS.	Section 7, Article IX, Constitution of Missouri, 1945, providing for distribution of liquidated county school fund refers to entire capital of fund.
64-48	Apr 15	TAXATION AND REVENUE.	Method of computation of Missouri inheritance tax upon contingent remainders under Sec. 597, R. S. Mo. 1939, as amended, Laws 1943, p. 307.
64-48	July 28	TAXATION. REVENUE.	Construction of House Bill No. 888 of the 63rd General Assembly found Laws of Missouri, 1945, page 1921, as applied to banks located within the City of St. Joseph, Missouri.
64-48	Nov 29	ROADS AND BRIDGES. SPECIAL ROAD DISTRICTS.	Special road district in county under township organization is entitled to have returned to such special road district all revenue raised by taxation of property within the special road district under levy authorized by Section 8820, Laws of 1947, page 483.
65-48	Feb 16	DRAINAGE DISTRICTS.	Drainage Districts organized by Circuit Court may issue bonds without vote of two-thirds of voters.
65-48	Mar 12	TAXATION. COUNTY. BONDS. SPECIAL ROAD DISTRICTS.	Taxes levied under Sec. 11(c), Art. X, Consti. '45, and Sec. 8606, page 1478, Laws '45, to retire bonds voted must be levied against all taxable property in the county. It is the duty of collector to collect all taxes levied on property except as otherwise provided in Sec. 11084, R.S.Mo. '39. Special road districts not entitled to receive foregoing taxes on property located in said districts.
65-48	Mar 15	HEARING IN PROBATE COURT BEFORE DISCHARGED COUNTY PATIENT IN STATE HOSPITAL FOR THE INSANE CAN BE RE-COMMITTED.	County patient discharged by State hospital for the insane cannot be re-committed without a further sanity hearing by Probate Court.
65-48	May 6	SCHOOLS.	District transporting school children to another district may not sell school house.
65-48	May 25	APPROPRIATION FOR OFFICE OF THE DIRECTOR OF	The Director of the Division of Mental Diseases has authority, with the ordinary departmental approval, to employ firm of consulting engineers to make survey of water facilities at state hospital, and pay

		DIVISION OF MENTAL DISEASES.	said firm out of funds appropriated for payment of necessary employees of the office of said director.
65-48	June 18	VITAL STATISTICS. PUBLIC HEALTH AND WELFARE.	Section 24(2) of Uniform Vital Statistics Act is violated by issuing different types of certificates for legitimate and illegitimate births.
65-48	Aug 6	APPROPRIATION TO DIVISION OF MENTAL DISEASES FOR ADDITIONS, REPAIRS AND REPLACEMENTS TO PRESENT BUILDINGS AND EQUIPMENT.	Appropriation to Division of Mental Diseases for **** replacements to present buildings available for building new dwelling house on farm purchased by state for State Hospital No. 1 in lieu of inadequate dwelling house removed by said division.
66-48	Mar 23	NEWSPAPERS.	The provisions of Section 14968, R.S.Mo. 1939, as amended Laws of Missouri 1943, page 859, relating to duration of consecutive publication of newspapers do not apply to newspapers which became legal publications prior to the effective date of the 1937 act, Laws of 1937, page 432, or the Act of 1943, Laws of 1943, page 859.
66-48	May 14	STATE BOARD OF TRAINING SCHOOLS. RESIDENCE.	Employees of Board not required to be residents; officers appointed by Board, except those who are specialists, must have resided in state for one year.
66-48	June 24	TRAINING BOARD.	Construction of Section 8994, Senate Bill No. 289, passed by the 64th General Assembly, relating to commitments to the State Board of Training Schools.
66-48	June 30	ELECTIONS.	Primary election returns for elective state officers canvassed by board of state canvassers.
66-48	June 30	MOTOR VEHICLES.	Association of farmers organized for the sole purpose of transporting milk from their farms to market in St. Louis required to take out a local commercial motor vehicle license.
66-48	Nov 29	CORPORATIONS – DISSOLUTION.	A banking corporation is not dissolved by reason of the sale of its assets or property to another banking corporation.
66-48	Dec 8	Hon. Edgar C. Nelson	WITHDRAWN
67-48	Oct 11	ELECTIONS.	City Election on tax levy to be held in conjunction with general election on November 2, 1948; proposition for increase in city tax levy in St. Joseph, a first class city, for the purposes specified in Act of January 25, 1946, Laws Mo. 1945, pp. 1286-1288, may be voted upon at November General Election, and election machinery provided for general election may be utilized, including election judges and clerks.

67-48	Dec 7	SHERIFFS.	Sheriff in county of second class may: (1) retain compensation for official services in civil matters not to exceed a yearly sum of \$3900.00; (2) sheriff in second class county may not retain monthly a sum in excess of one-twelfth of \$3900.00; (3) except said sheriff may retain during last month of his official year a sufficient amount as will cause his compensation for the official year to reach the amount of \$3900.00.
67-48	Dec 22	COUNTY COURTS. BUDGET LAW. CONSTITUTIONAL LAW.	Sec. 18, Art. 6, Constitution, is self-enforcing and county court upon request and charter commission should provide in budget for expense of holding election for approval or rejection of charters and should include in budget actual and necessary expenses of the charter commission, such amount to be determined by the county court.
67-48	Dec 31	Hon. William B. Norris, Jr.	WITHDRAWN
69-48	Jan 15	PROBATE COURTS. INSANE PERSONS.	Further insanity hearing not necessary when pay patient made county patient.
72-48	May 19	COUNTY MEMORIAL HOSPITAL.	Private or pay patients are eligible for admission into a county memorial hospital or a memorial addition to an existing county hospital.
72-48	July 8	MUNICIPALITIES. STREETS. TRAFFIC REGULATIONS.	Kansas City may enact ordinances providing for reversible lanes for expediting traffic on Broadway from Linwood to Westport Avenue.
73-48	July 16	CIRCUIT CLERKS. RECORDERS. FEES.	Circuit clerk's and recorders' fees collected under provisions of House Bill No. 65 of the 64th General Assembly must be turned into the county treasury.
74-48	Jan 17	SCHOOLS.	Tuition cannot be paid for elementary pupils voluntarily attending other districts and such pupils cannot be counted toward teaching units.
75-48	Feb 19	SCHOOLS. COUNTY SUPERINTENDENT.	Meals and lodging are a part of county superintendent's traveling expenses, and mileage shall be allowed for travel outside his county.
75-48	July 16	BOARD OF PHARMACY.	Pharmacist licensed in England entitled to license by reciprocity in this state upon showing that England extends reciprocity to Missouri licensees.
77-48	June 9	ASSESSORS. FEES.	County assessor in county of 4th class having a population of over 7500 according to 1940 census is entitled to 45¢ for each nonresident real estate list.

77-48	Nov 9	LIBRARY STATE APPROPRIATIONS.	1) Purchases of supplies made without certification of Comptroller and Auditor are void and State not liable for payment. 2) Title to void purchase remains in seller and State may later purchase such supplies.
80-48	Mar 15	SHERIFFS. MAGISTRATE COURT. EMINENT DOMAINS IN COUNTY COURTS.	Sheriff allowed fee for each day he or deputy attends magistrate court. County court can condemn land to establish public roads.
81-48	Jan 9	APPROPRIATIONS. TRAINING SCHOOLS.	Appropriations for Training Schools at Boonville, Chillicothe and Tipton for payment of teachers' salaries, educational supplies, etc., should not be made out of that part of the general revenue set apart for the free public schools.
81-48	June 7	TRUST COMPANIES.	A trust company, under the laws of this State, may not acquire or own all of the capital stock, or a controlling interest, in another trust company in this State.
81-48	June 14	UNCLAIMED BANK DEPOSITS.	The Commissioner of the Division of Finance in Missouri may not lawfully pay to one creditor or depositor unclaimed deposits remaining in his custody upon the liquidation of a bank or trust company to the exclusion of other creditors or depositors having claims against such fund. The Commissioner must, under Section 7898, R.S.Mo. 1939, after such unclaimed deposits have been held by him for a period of more than six years pay the same to the Escheat Fund of the State.
81-48	Aug 20	LOTTERIES.	Theater scheme whereby contestant identifies local resident by clues is a lottery.
81-48	Aug 23	LOTTERIES.	Merchandising scheme with prize award by lot and quiz question is a lottery.
81-48	Oct 21	ELECTIONS.	Cross mark must be placed in square at the left of "write-in" candidate's name.
81-48	Nov 10	CREDIT UNIONS.	There is no statutory authority in Missouri permitting the changing of a state credit union to a federal credit union.
83-48	Mar 19	COUNTY LIBRARY.	Election to establish County Library System to be held at annual school meeting and conducted as election for county superintendent of schools.
83-48	June 9	ELECTIONS. RESIDENCE.	Persons residing on government lands ceded by the state are not residents for the purpose of voting.
83-48	June 9	MOTOR VEHICLES. PUBLIC SERVICE COMMISSION.	A lessee of a truck and driver for a period of less than ten days, for the purpose of transporting for hire property or persons, before operating said truck on the highways, must obtain a certificate of convenience and necessity from the Public Service Commission.

83-48	June 9	STATE BOARD OF TRAINING SCHOOLS.	Board of Training Schools loses control of person transferred to adult correctional institution.
83-48	Aug 2	DIVISION OF PROCUREMENT.	Duties of the State Purchasing Agent, with reference to contract for the erection of new buildings, repair and alteration of existing structures, and installation of equipment.
83-48	Aug 18	Hon. Wayne v. Slankard	WITHDRAWN
83-48	Sept 1	PUBLIC WORKS.	Missouri State Board of Training Schools is authorized to negotiate contracts for the erection of new buildings.
83-48	Sept 23	DIVISION OF PROCUREMENT.	State purchasing agent to contract for maintenance service of equipment.
83-48	Sept 24	Hon. Wayne V. Slankard	WITHDRAWN
83-48	Oct 29	MUNICIPAL CORPORATIONS AND TAXATION.	State not subject to Ordinance No. 44678 of the City of St. Louis (Earnings Tax).
83-48	Dec 3	CIRCUIT JUDGES. COMPENSATION AND EXPENSES.	Circuit judge when holding court outside of his circuit is entitled to five cents per mile, and ten dollars per day.
84-48	Feb 13	TAXATION. MERCHANTS' TAX. PERSONAL PROPERTY TAX.	Stock of goods in store in Boone County, owned by resident of Randolph County, assessed in Boone County; fixtures in such store assessed in Randolph County. Stock of goods located in city, owned by individual who lives in county, assessed in city; fixtures in such store assessed only in county. When stock of goods or fixtures in store are owned by corporation, property is taxed wherever located.
84-48	Mar 11	LEGALITY OF COUNTY HIGHWAY ENGINEER'S BOND.	1. Bond not sufficient in amount. 2. Bond insufficient because qualification of legality keeps it from continuing conditions required by statute. 3. Members of County Court who voted to accept bond might be liable if damages accrued as a result of its insufficiency.
84-48	Sept 11	ELECTION.	County committee may nominate candidate for county judge to fill vacancy caused by death of incumbent subsequent to primary.
87-48	Sept 20	ELECTION.	Judges and precinct judges and clerks in St. Louis City, who worked past midnight on date of August primary, are not entitled to extra day's pay therefor, but are limited to pay for days mentioned in Article 24, Chapter 76, Mo. R.S.A.
88-48	Nov 12	CORONERS.	Coroner of St. Louis City elected November 2, 1948, takes office January 1, 1949. Bond in amount of \$10,000.00 must be given by said Coroner within 20 days after election.

89-48	Mar 3	MAGISTRATE COURTS. CHANGE OF VENUE.	Cost of making out transcript of record in change of venue to be charged after such change of venue.
89-48	Mar 26	OFFICERS. FEES. PROSECUTING ATTORNEYS.	Prosecuting attorney is not entitled to fee for preparing transcript of bond issue voted for bridge improvement by county.
89-48	Apr 14	LIQUOR CONTROL.	A licensee, convicted in a magistrate court of selling nonintoxicating beer to a minor, who files his appeal to the circuit court, has no right to operate during the time the appeal is pending, as such conviction has revoked his license as of the date of said conviction.
89-48	Apr 20	COUNTY COURTS. BONDS.	Proper procedure for selling bonds under Sec. 3300, page 600, Laws of Missouri, 1945.
89-48	May 12	SHERIFF. ELECTIONS.	For a person to be eligible for the office of sheriff in the State of Mo., pursuant to Sec. 13125, supra, the eligibility of said person must be demonstrable at the time of the commencement of the term of office and of the taking possession of the office. The term "resident taxpayer" means one must have paid or be subject to taxes on either real property, personal property, or intangible personal property and at least a portion of said taxes must go to the local government in the place of which the taxpayer resides.
89-48	Sept 28	MOTOR VEHICLES.	"Taxicab" owner as defined by city ordinance, not complying with municipal regulatory ordinance, is subject to Motor Vehicle Safety Responsibility Act.
90-48	Apr 6	APPEALS.	The Personnel Advisory Board under the State Merit System Act has jurisdiction to hear an appeal from the order of the Merit System Council.
90-48	Oct 14	TRAINING SCHOOLS. STATE MERIT SYSTEM ACT.	By reason of certain enactments of the 63rd General Assembly, the director and superintendents of training schools of the State of Missouri are within the provisions of the State Merit System Act.
92-48	Dec 10	TAXES. BRIDGES.	Limitations of time in which suits may be brought for collection of delinquent taxes on bridges across rivers.
93-48	Jan 5	Hon. Henry C. Walker	WITHDRAWN
93-48	Jan 14	MOTOR VEHICLES.	Relating to licenses for local commercial motor vehicles.
93-48	Jan 22	MOTOR VEHICLES. DEALERS.	Motorcycle dealer's license plates may not be used on automobiles offered for sale by such dealers.
93-48	Feb 10	PROBATE JUDGE. OFFICERS.	Probate judge not licensed to practice law may succeed himself in office, if he was holding said office on March 30, 1945.

93-48	Mar 23	RECIPROCITY.	Reciprocity agreement between Missouri and Illinois does not apply to Missouri vehicle licensed for local operation while operating in Illinois.
93-48	Mar 24	MOTOR VEHICLES.	Self-propelled crane mounted on pneumatic tires, designed primarily for construction work, need not be registered as motor vehicle.
93-48	Apr 29	MOTOR VEHICLES.	Operator's duty, not manufacturer's to see that motor vehicle is equipped with proper lights under Sec. 8386q, Mo. R. S. Ann.
93-48	June 2	COURTS. SERVICE.	Witnesses must be served personally; service by telephone, etc., is not legal service.
93-48	Sept 7	Hon. Wayne T. Walker	WITHDRAWN
93-48	Sept 15	CONSTITUTIONAL LAW. HIGHWAY PATROL. MOTOR VEHICLES.	Penalty assessment plan for motor vehicle violation would be unconstitutional.
93-48	Nov 5	MOTOR VEHICLES.	Proof of financial responsibility must be maintained in the future.
93-48	Dec 15	STATE HIGHWAY PATROL. CORONERS.	Coroner not authorized to issue blanket order requiring state patrol to leave dead bodies at scene of accident until his arrival.
94-48	Apr 2	MAGISTRATE COURTS. CRIMINAL COSTS.	Where defendants are charged and tried jointly in the magistrate court, separate prosecuting attorney's fees are chargeable, but only one set of clerk's fees is chargeable.
95-48	Feb 14	DRAINAGE DISTRICTS.	County court drainage districts liable for construction of or replacement of a collapsed bridge over one of its's ditches.
95-48	Aug 4	COUNTY BOARD OF EDUCATION. COMMON SCHOOL DISTRICT.	School board members and nonmembers both eligible to serve on county board of education. Board of directors cannot levy tax of sixty-five cents solely for building purposes without voter approval.
95-48	Oct 14	ELECTIONS.	Duty of Judge to assist illiterate voter.
96-48	Mar 1	Hon. Walter Whinrey	WITHDRAWN
96-48	Mar 10	MUNICIPAL CORPORATIONS.	A municipality and a state agency of the state may contract and cooperate for the purpose of building a sewage disposal plant to be used by the city and the state agency.
96-48	July 20	SCHOOLS. CONSTITUTIONAL LAW.	Section 3 (c), Article IX of the Constitution is self-enforcing; and it is the duty of the State Board of Education to enforce said provision.
96-48	Aug 5	SCHOOLS.	Senate Bill No. 4 of the 64th General Assembly applies to junior

		JUNIOR COLLEGES.	colleges.
96-48	Feb 7	Hon. Hugh P. Williamson	WITHDRAWN
97-48	May 20	ELECTIONS. COMMITTEEMAN.	Townships only entitled to representation when county has not recognized city wards as election districts.
97-48	June 17	DOUBLE JEOPARDY.	Failure to support children is a continuing offense and one conviction therefor will not prevent subsequent conviction for some offense on another day, and will not subject person charged to double jeopardy.
97-48	July 10	CITIES. AIRPORTS.	Cities of third-class may acquire land for airport without boundaries of said city and in another county. However, in the absence of specific legislation, said city cannot exercise police power for violations of regulations and laws on said airport.
97-48	July 21	COUNTY COURTS.	County courts in counties of the third class may charge mileage for each trip in going to and from court.
97-48	Sept 23		Opinion Letter to the Honorable Robert P. C. Wilson III
97-48	Nov 16	TAXATION.	Property not presently used for charitable or religious purposes not entitled to exemption from taxation.
98-48	Jan 6	STATE BOARD OF OPTOMETRY. ADVERTISING.	The advertisement of optometric services on credit is the advertisement of "prices or terms for optometric services" under Section 10121 (g), R. S. Mo., 1939, as amended.
99-48	July 20	TOWNSHIPS. ELECTIONS.	If proper petition is presented to county court requesting submission of the proposition of adoption of township organization at general election, subsequent to election at which township organization was voted out, question of adoption must be submitted to voters at next general election.
100-48	Jan 28	SCHOOLS.	Money from sale of buildings bought with unappropriated funds by state teachers college need not be deposited in the State Treasury.

ROADS AND BRIDGES:

County court cannot collect from special road district for repairs to bridge in such special road district; may assist special road district organized under Art. 10, Chap. 46, R.S. 1939, in maintaining bridges, such money to be paid out of class 6 of the budget; cannot pay for maintaining a bridge in a special road district organized under Art. 11, Chap. 46, R.S. 1939.

January 27, 1948



Honorable Frank M. Adams
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Please give me an opinion on the following question:

"Sections 8534, 8535 and 8526 relate to the liability of counties and special road districts with reference to building and maintaining of bridges. They provide for bridges and culverts costing more than \$50.00 to build or repair and state that the Special Road districts cannot be made to do any work if the cost is more than \$50.00.

"Sections 10911 and 10914 of the budget law, provide that no money shall be spent in special road districts by the county.

"The fact situation in my question is as follows: We have a large bridge in this county (Polk) over the Pomme De Terra river. The line between a special road district and the common district is the middle of the river, so that about half of the bridge is in the county common district and half in a special road district. The county court had never specified whether they would keep the bridge in repair or the special. The county court did order material and had a new floor put in, and sent a bill for one half of the cost

it being more than \$50.00. The special refuses to pay the bill.

"Question: Can the county court collect the one half repair bill from the special road district? If the answer is no, then can the county court pay the cost themselves from the funds in the Special road and bridge fund?"

In your letter you refer to Sections 8534 and 8535, and, we believe inadvertently, to Section 8526, when you mean Section 8536, as having reference to the liability of counties and special road districts regarding the building and maintaining of bridges. It is our view that Sections 8534, 8535 and 8536 do not refer to special road districts, but refer to common road districts, since Articles 10, 11 and 18 of Chapter 46, R.S. Mo. 1939, treat in detail with regard to special road districts.

We are unable to find any provision of law under which the county court could collect from a special road district for its voluntary action in repairing a bridge in a special road district.

In your letter you have not stated whether in Polk County, a county not under township organization, the special road district you refer to is one organized under the provisions of Article 10 of Chapter 46 or under the provisions of Article 11 of Chapter 46. Therefore, this opinion will discuss the question of the payment of such repair bill by both a road district formed under the provisions of Article 10 of Chapter 46 and a road district formed under the provisions of Article 11 of Chapter 46.

We are enclosing a copy of an official opinion of this department rendered under date of December 30, 1947, to Theo. R. Schneider, in which the question of the right of the county court to assist in building and maintaining bridges in a road district formed under the provisions of Article 18, Chapter 46, is discussed. While your county is not one under township organization, we believe the conclusion reached with regard to a road district formed under the provisions of Article 18, Chapter 46, apply equally to road districts formed under the provisions of Article 11, Chapter 46, since Section 8714 of Article 11 provides that the commissioners of the road district shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district, to construct, improve and repair such highways, bridges and culverts, and shall at all times keep such roads, bridges

and culverts in as good condition as the means at their command will permit, and for the further reason that there is no provision in such Article 11 authorizing the granting of assistance by the county court in repairing bridges in such a road district.

Since Sections 10911 and 10914 of the budget law of this state provide that expenditures out of class 3 are not to be made by the county court in any special road district, it is our opinion that the expenditures authorized for the repairing of bridges in special road districts organized under the provisions of Article 10, Chapter 46, found in Section 8688, R.S. Mo. 1939, should be made out of class 6 of the county budget.

Since there is no authority for the county to expend money to repair bridges in special road districts organized under Article 11, Chapter 46, the county has no authority to pay for such repairs out of the county funds.

CONCLUSION

It is the opinion of this department that the county court cannot collect from a special road district for the repairs to a bridge in such special road district.

It is further the opinion of this department that repairs to a bridge in a special road district in Polk County organized under the provisions of Article 10, Chapter 46, R.S. Mo. 1939, may be paid for out of funds in class 6 of the county budget.

It is further the opinion of this department that the county court cannot pay out of county funds for repairs of a bridge in a special road district organized under the provisions of Article 11, Chapter 46, R.S. Mo. 1939.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

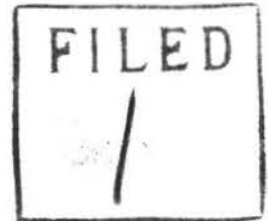
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RECORDER: Contents of annual report that the recorder shall
make to the court of all kinds of fees received by
FEEES: him under Section 1, page 1526, Laws of 1945.

COPY

January 30, 1948

Opinion No. 1



Honorable George P. Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Please advise the type of annual report that a recorder of deeds in a county of the third class, where the office of recorder and circuit clerk are separate, must make under the provisions of Sec. 13187.1, Laws 1945, page 1526.

"According to that section the report must contain an account 'of all fees of every kind received'. Obviously in such an office where the fees range from ten cents to several dollars it would take an additional deputy to make the report itself.

"Is it not possible that a summary report of some sort could be made which would satisfy the provisions of this section?"

Section 13187.1, Mo. R. S. A., reads:

"The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all fees received by him, over and above the sum of \$4000 except those set out in Section 2 hereof, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

The primary rule of construction of statutes is to ascertain and give effect to the lawmakers intent, and this should be done with words used, if possible, considering the language honestly and faithfully. See Haynes vs. Unemployment Compensation Commission, 183 S.W. (2d) 77, 1.c. 81, 353 Mo. 540; also City of St. Louis vs. Senter Commission Company, 85 S.W. (2d) 21, 337 Mo. 238.

A careful examination fails to disclose wherein the courts have construed the following words as used in the above statute, "full, true and faithful account." In Re Umbel, 80 A. 541, 542, 231 Pa. 94. The court did construe the following words requiring a candidate to file "a full, true and detailed account" of expenditures made to secure nominations, and held the account must set forth each sum disbursed by the candidate whether personally or by his agent for election expenses, date of each disbursement, name of person to whom paid, and purpose for which same was disbursed, and in so holding, the court said:

" * * * An account which merely exhibits the fact that the candidate has deposited money in the hands of an agent to be used for legitimate expenses, and does not show the person to whom and the purpose for which the agent paid the money, is not such "a full, true, and detailed account" as the act plainly contemplates. * *

"To be a true account within the spirit and intent of the act, it must set forth each and every sum of money disbursed by the candidate, whether personally or by his agent, for election expenses, the date of each disbursement, the name of the person to whom paid, and the object or purpose for which the same was disbursed; and, moreover, the account must be accompanied by vouchers for all sums expended exceeding \$10 in amount. * * * * * Unless these facts can be developed on the audit, one of the manifest purposes of the act can be easily defeated by the omission to give the information in the account itself. * * * *"

We are not unmindful of the fact that the foregoing phrase that the court was construing included the word "detailed,"

which might have to some extent influenced the court to render such a construction. However, upon reading the above dedsion, we are inclined to believe that the court would have so construed the provision even if it had not contained the word "detailed."

In Quinn vs. Donovan, 85 Ill. 194, 195, the court defined the word "full" from Webster's Dictionary as follows:

" * * * One of Webster's definitions of the word 'full' is 'complete, entire, without abatement,--mature, perfect.' * * *"

Also in Fluet vs. McCabe, 12 N.E. (2d) 89, 1.c. 93, the court defined "full" in the following manner:

"The charter specifically provides that the city council shall have 'full supervision' of the repair of all public buildings. Section 27. The word 'full,' as used, clearly means entire, complete. * *"

In Johnson vs. Des Moines Life Association, 75 N.W. 101, 1.c. 102, 105 Iowa 273, 276, the court defined the word "true" as follows:

" * * The following definitions found in Webster's International Dictionary will aid in solving this question. * * * * *

'True. (1) Conformable to fact; in accordance with the actual state of things; correct; not false, erroneous, inaccurate, or the like; as a true relation or narration; a true history. A declaration is true when it states the facts. (2) Right, to precision; conformable to a rule or pattern; exact; accurate; as a true copy; a true likeness of the original.' * * * "

See also Cook vs. Dunbar, 18 A. (2d) 656, 1.c. 663, 66 R. I. 266, wherein the court construed the word "true" to be synonymous with "correct."

The word "faithful" is most commonly used in statutes when referring to official duties of officers or relating to official bonds. In Wright vs. Fidelity & Deposit Co. of Maryland, 54 Pac. (2d) 1084, 1087, 176 Okla. 274, the court

defined "faithful" as being synonymous with trusty, honest and trustworthy, and in so holding, said:

" * * * The word 'faithful' is defined in Webster's New International Dictionary as being synonymous with 'trusty,' 'honest,' and 'trustworthy.' * * * "

While we have been unable to find wherein the courts have construed the words as used in the above statute, considering all of the foregoing definitions together, we believe that the Legislature, by the use of so many adjectives prior to the word "account," certainly intended that such account should be more comprehensive and not merely include the total amount of all fees received by said recorder. It would have been an easy manner for the Legislature to have merely required the recorder to furnish the county court an annual report containing the total amount of all fees received and stop at that. But instead, they required said recorder to make a full, true and faithful account of all fees of every kind received. So, it is quite apparent that the Legislature, in enacting the foregoing provisions, intended that the report should be more complete than to include just the amount of fees received. This report should probably contain the amount of fees received, date received, who paid same and the purpose of said fee.

CONCLUSION

Therefore, it is the opinion of this department that the recorder, under Section 13187.1, Mo. R. S. A., is required to make an annual report to the county court. Said reports should contain the fees received by him, date he received same, party paying same, and state the purpose ~~for~~ said fees. We regret if this works undue hardship upon said recorder; however, if it does, then it is a matter that should be called to the attention of the Legislature.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

BONDS:
COUNTY COURT:

Authority of county court to transfer money in general revenue fund to sinking fund for payment of interest and principal of bonds when same become due.

February 20, 1948



Honorable George P. Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"In 1946 Audrain County voted a \$500,000 bond issue and the county court did not set its levy high enough to provide sufficient revenue to permit the early maturing bonds and interest to be paid out of the sinking fund.

"This deficiency has existed for the past three years and will exist for a couple of more years. In the meantime the county court has been paying the deficiency out of the county revenue fund. After the early maturing bonds have been retired the rate of interest that the balance bears is such that the present levy will handle the retirement of the bonds and interest.

"This county is sufficiently solvent that the county revenue fund is not hurt by these payments.

"Will you please advise whether or not the county court has been acting properly in supplying this deficiency out of the county revenue? If so, are they entitled eventually to withdraw from the sinking and interest fund, when the same will exceed the amount necessary to meet bond retirement and interest, the amount theretofore drawn from the county revenue fund?

Honorable George P. Adams

"Please also advise what authority the county court has to raise the levy necessary for the purpose of providing for bond retirement and interest."

Under Section 3282, R. S. Mo. 1939, any county issuing bonds shall, at the time of issuing same, provide in the express manner provided by law for levying and collection of an annual tax sufficient to pay the annual interest on such fund bonds as it falls due, and the sufficient sinking fund for the payment of principal of such bonds when they become due.

Section 3283, R. S. Mo. 1939, provides that the proceeds of sale of bonds and money derived by tax levy for interest and sinking fund, shall be kept by the proper county authorities having control of said funds, separate and apart from all other funds. In no case shall the proceeds from the sale of any bonds so sold be used for any other purpose than for the purpose for which the bonds were voted, nor shall the sinking fund or interest collected, by reason thereof to meet the interest on said bonds, be used for any other purpose than to meet the interest and principal of said bonds.

You now inquire if the county court has exceeded its jurisdiction in transferring money out of the general revenue fund to cover a deficiency in said sinking fund, for the payment of interest and principal when same becomes due, in view of the fact the levy was apparently insufficient to cover this cost. You state, however, in the near future this deficiency will be corrected, and the present levy will then be adequate to retire the bonds and pay the interest thereon.

In State vs. Railroad, 315 Mo. 430, 1.c. 434, 435, 286 S.W. 360, the court, in holding that an order purporting to levy a tax to meet the principal and interest does not limit the power to increase the rates subsequently thereto, said:

" * * * The funding of such an indebtedness and the levying and collecting of taxes to pay the bonds issued pursuant thereto, are governed exclusively by Article IV, Chapter 8, Revised Statutes 1919. Section 1042 of that article provides that no such funding bonds shall be payable 'in less than five nor more than thirty years from the date thereof.' And Section 1045 commands that any county issuing such bonds, 'shall, at the time of issuing the same, provide in the express manner provided by law for the levy and collection of an annual tax sufficient to pay the annual interest on such

Honorable George P. Adams

funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due.' The only limitation imposed by the statute as to the amount of the annual tax is contained in the language: 'sufficient to pay the annual interest on such funding bonds as it falls due, and a sufficient sinking fund for the payment of the principal of such bonds when they become due.'

* * * * *

"It could not have been the purpose of the Legislature in enacting Section 1045 to require the county court to fix in advance an annual rate of taxation which could not be changed during the life of the bonds, whether that was a period of five years or one of thirty. So many unknown factors are involved in every such situation that it could by no possibility be foreseen what annual rate throughout the entire period such bonds would run would yield an annual tax 'sufficient to pay the annual interest . . . and a sufficient sinking fund for the payment of the principal . . . when they become due.'

"One of the dominant purposes of the Constitution of 1875 and of legislation immediately following its adoption, was to extricate the counties from the morass of debts in which most of them were involved, put them on a cash basis and keep them on it. Pursuant to that general purpose they were permitted to fund their old indebtedness, but were required at the time of doing so to provide ways and means for promptly liquidating it. The County Court of Cass County would have complied with both the letter and spirit of Section 1045 if at the time of issuing its funding bonds it had made an order that thereafter there should be levied upon all the taxable property of the county an annual tax 'sufficient,' etc. The order as made was not therefore a limitation on the power of future county courts to fix such a rate from time to time as would yield under existing conditions an annual tax conforming to the requirements of the statute."

Honorable George P. Adams

While we are of the opinion that it would have been better for the county court to have increased the tax levy to provide sufficient money in the sinking fund for this purpose, providing such increased levy would not exceed the statutory and constitutional limitation, the county court was not exceeding its jurisdiction in transferring money from the general revenue to the sinking fund to be used for the purpose of paying interest and retiring the principal when it became due, provided all warrants and obligations incurred by the county for the current year and previous years had been honored and fully satisfied. The 61st General Assembly amended the Budget Act, page 651, Laws of Missouri, 1941. Under Section 10911, Class 6, we find the following:

"After having provided for the five classes of expenses heretofore specified, the county court may expend any balance for any lawful purpose: * * * * "

Furthermore, Section 13829, R. S. Mo. 1939, provides that when there is a balance in any county treasury to the credit of any special fund, no longer needed for the purpose for which it was raised, the county court by order may direct the balance transferred to the general revenue fund of the county, or to such other fund as in their judgment needs such balance. Section 13830, R. S. Mo. 1939, further provides that nothing in the preceding section shall authorize a county court to transfer or consolidate any funds not otherwise provided by law, excepting balances of funds of which the object of their creation are and have been fully satisfied. In *State ex rel. vs. Appleby*, 136 Mo. 408, 1.c. 412, 413, the court said:

"We do not think section 7663 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should be unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or other reason, why the

Honorable George P. Adams

court may not transfer the surplus in order to make up the deficiency. Indeed sections 3189 and 3190 expressly provide for such transfer."

Therefore, assuming there are no outstanding warrants or obligations against the county for the current or previous years, we are of the opinion that the county court acted, in this instance, within its jurisdiction in transferring money from the general revenue fund to the sinking fund.

The law is well established that none of the money in this sinking fund, created for the purpose of paying interest and retiring the principal, can be transferred or used for any other purpose than the purpose for which the fund was raised. In Volume 61, Corpus Juris, Section 2235, page 1521, we find the following general principle of law which supports the foregoing conclusion, and reads in part:

"Taxes which are set apart by the constitution of the state for particular uses cannot be diverted by the legislature to any other purpose, and neither can funds derived from taxes levied and collected for particular purposes be legally utilized for, or diverted to, any other purpose, * * "

Also in State ex rel. Hopper vs. Cottengin, 172 Mo. 129, l.c. 135, the Supreme Court said:

"* * * The fund in question was no part of the general revenue fund of the county. It was a special fund raised for a particular purpose, and neither the county court nor the county treasurer had any right to apply a dollar of it to any other purpose.* * "

At the present time, you are not primarily concerned about transferring money that was raised for the purpose of paying interest and retiring the principal, to another fund to be used for an entirely different purpose; however, eventually this question will arise, so you now make that inquiry. In view of the foregoing statutes authorizing the transferring of balances in funds no longer needed for the purpose for which they were raised, we believe that upon payment of all interest and principal, and there being no longer any need for the balance in said sinking fund for the purpose for which it was raised, that the county court may transfer the unexpended balance in said fund to any other fund for any lawful purpose that in their judgment may be needed.

Honorable George P. Adams

CONCLUSION

Therefore, it is the opinion of this department that the county court, under the foregoing conditions, was not exceeding its jurisdiction in transferring some unexpended money out of the general revenue fund to the sinking fund, to pay interest and principal of such bonds when it became due. However, the county court could have increased the levy if it found the present levy was inadequate, provided in so doing it did not exceed the statutory or constitutional limitation; and last, the county court may transfer any unexpended balance in the sinking fund to any other fund that in the judgment of the county court needs same. Of course, this can only be done when the county court is sure that the money in the sinking fund is no longer needed for the purpose for which it was raised.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CONSERVATION COMMISSION: Employees of a resident state bait dealer
FISH AND GAME: cannot trap minnows under permit issued
to employer.

FILED
/

September 27, 1948

10-4
Honorable Frank M. Adams
Prosecuting Attorney
Polk County
Bolivar, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I respectfully submit the following question concerning Section 19, 'J' of the Wildlife and Forestry Code entitled, Residents State Bait Dealers Permit.

"Question: In trapping minnows under the above section can the licensee employ agents to run traps without the agents having a licence issued to them."

In so far as we can determine, this particular regulation referred to in your request has never been construed by any of the appellate courts of this state.

It is a well established rule of statutory construction that different sections of an act relating to the same general subject matter must be construed together and, if possible, harmonized. The same rule is applicable to regulations. See Parks v. State Social Security Commission, 160 S.W. (2d) 823, 236 Mo. App. 1054; also, Johnson v. Kruckemeyer et al., 29 S.W. (2d) 730, 224 Mo. App. 351.

A careful examination of the following regulations may aid in construing Section 19, subsection (J), Wildlife and Forestry Code of the State of Missouri, which reads:

"Sec. 19. Resident permits.--Subject to the provisions of these regulations, permits may be obtained by residents of this

state as evidences of granted and revocable privileges to pursue, take, transport, ship, buy, sell, store, serve, use or possess certain wildlife, throughout the state, except as otherwise specifically provided (see Sec. 19-D), upon the payment of the fees hereinafter stipulated.

* * * * *

"(J) Resident State Bait Dealer's Permit \$10.00.--To possess, propagate and sell live minnows, crayfish and frogs for bait upon the payment of a resident bait-dealer's permit fee of ten dollars (\$10.00)."

Section 12 of the Wildlife and Forestry Code of Missouri, 1948, requires that all permits shall be signed by and carried upon the person of the permittee, or posted in the place of business of the holder thereof when so required, and reads:

"All permits shall be signed by and carried upon the person of the permittee, or posted in the place of business of the holder thereof when so required, and shall, on demand, be exhibited to any officer charged with the enforcement of these regulations, or to any transportation company or postal employee to whom is presented any wildlife for shipment."

There is no specific statute or regulation requiring a resident state bait dealer to post his permit in his place of business. Furthermore, in view of Section 12, supra, it would be impossible for an agent or employee of such permittee to be afforded the same protection as said permittee, his employer, if he should be carrying the permit issued to his employer.

Under Section 13 of said Wildlife and Forestry Code of Missouri it requires all permits issued pursuant to these regulations are nontransferable. Said section reads:

"All permits, issued pursuant to these regulations, are nontransferable, and shall expire on the last day of the calendar year for which issued except as otherwise stated on the face thereof,

unless sooner revoked or suspended for cause; and no affidavit, receipt or other document may be used in lieu of the required permit."

Also, Section 54 of said Wildlife and Forestry Code of Missouri authorizes the holder of a resident bait dealer's permit to take minnows from the wild stock of this state, and reads:

"Minnows, crayfish, and frogs, as herein defined, which have been propagated or legally possessed by the holder of a resident bait dealer's or game breeder's permit, may be bought, sold, transported or shipped by such permittee for bait at any time in any quantity. Minnows and crayfish may be taken for commercial purposes by the holders of resident bait dealer's permits, by hand or by the use of wire traps of a mesh not smaller than one-fourth inch ($\frac{1}{4}$ ") bar measure, and with no entrance opening larger than one and one-fourth inch ($1\frac{1}{4}$ ") in any dimension."

It has been the practice in this state that, when in pursuit or taking wildlife, the Conservation Commission of this state issues permits in such cases only to individuals for their sole use, and are not issued to corporations or partnerships. There are only a few instances when one single permit is all that is required for a permittee and his employees. One instance is in case of a game breeder's permit. However, the reason for that is that the permittee and his employees are not pursuing or taking wildlife, but merely possessing and using same. It is apparent that one reason the Commission has required each individual to take out a permit in most instances is for the reason that it makes it much easier to enforce the laws of this state and the regulations promulgated by said Commission. If several persons were allowed to use a single permit issued to an individual, when in pursuit of or taking wildlife, it would be almost impossible to enforce said laws and regulations.

Hon. Frank M. Adams

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CONCLUSION

Therefore, considering all the foregoing regulations together and in view of the foregoing rule of construction, it is the opinion of this department that the permit issued to a resident bait dealer under and by virtue of the provisions of Section 19, subsection (J), supra, can only be used by the permittee and not his employees.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



ARH:LR

ROAD DISTRICTS: Residents of a special road district organized under Article 11, Chapter 46, R. S. Mo. 1939, cannot withdraw or detach themselves from the road district.

November 15, 1948

Honorable George P. Adams
Prosecuting Attorney
Audrain County
Mexico, Missouri



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"The residents of a certain school district which is located entirely in a certain special benefit assessment road district desire to withdraw or detach themselves from the road district and have asked that I write you for an opinion as to whether this can be done, and if so, what procedure must be followed.

"They would also like to know if they are separated will the county be obligated to care for the large bridges within the newly formed road district?"

We note that Audrain County is not under township organization. Therefore, the special road district you refer to is one organized under the provisions of Article 11, Chapter 46, R. S. Mo. 1939. We are unable to find in such article any provision whatsoever for any resident or residents to withdraw from such special road district. When the road district is established by the county court in the order made by such court setting out the boundaries of the district as established, all land within the boundaries of such district remains a part of such district until a statutory dissolution of the road district, as provided in Article 11, Chapter 46, R. S. Mo. 1939, has been made. The only provision in such article is for a complete dissolution.

Honorable George P. Adams

CONCLUSION

It is the opinion of this department that those persons who reside in and on land within the boundaries of a special road district, organized under provisions of Article 11, Chapter 46, R. S. Mo. 1939, have no power to withdraw or detach themselves from the road district.

It is further the opinion of this department that such road district may be dissolved if the statutory requirements found in Article 11, Chapter 46, are complied with.

Respectfully submitted,

C. B. Burns, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

*Copy to
J. Smith*
SHERIFFS:
EXTRADITION:
SALARIES AND FEES:

Sheriff cannot be paid mileage for travel beyond state for returning prisoner who has waived extradition. There is no requirement that the sheriff go beyond the state line for a fugitive.

February 16, 1948



2/17
Honorable Hugh M. Atwell
Prosecuting Attorney
Miller County
Eldon, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Will you please give me an interpretation of the laws regarding the payment of mileage of sheriffs outside the state?

"We have a situation in which criminals in felony cases have escaped into another state. After having them apprehended in another state, after they waive extradition, the sheriff is required to go into the other state to bring them back. I want to know how the sheriff is to collect his mileage for the miles traveled in the foreign state and who is liable for the payment of said mileage.

"If there is no provision for the payment of said mileage without the state, is the sheriff required by law to go beyond the state line for a fugitive?"

We are enclosing a copy of an official opinion of this department rendered under date of February 11, 1947, to Herbert S. Brown, which holds that a sheriff cannot be paid mileage for traveling beyond the State of Missouri for the purpose of returning to this state a prisoner who has waived extradition.

We are unable to find any statute in the State of Missouri which requires a sheriff to go beyond the state line for a fugitive.

Honorable Hugh M. Atwell

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CONCLUSION

It is the opinion of this department that a sheriff cannot be paid mileage for traveling beyond the state for the purpose of returning a prisoner who has waived extradition.

It is further the opinion of this department that a sheriff is not required by law to go beyond the state line for a fugitive.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

CBB:HR

ELECTIONS:

STATE REPRESENTATIVES:

Where tie vote in election for state representative occurs and question arises concerning legality of several votes cast, the State House of Representatives may make final determination.

November 24, 1948

FILED 3

Honorable William Aull III
Prosecuting Attorney
Lafayette County
Lexington, Missouri



Dear Mr. Aull:

This is in reply to your letter of recent date, requesting an opinion of this department, and reading as follows:

"In the general election held on November 2, 1948, in Lafayette County, Missouri, Homer Pruett, Democrat, received 6255 votes for representative in the state legislature and Charles H. Gladish, Republican, received 6255 votes for representative in the state legislature. No other person received any greater vote within said county for said office.

"(1) Is it mandatory that Sec. 11467 be followed and a special election called?

"(2) If the answer to the above be no, is it possible for one or the other of the two candidates to withdraw and thus certify the other as the winner of said election?

"(3) If the answer to Question One is in the negative is there any legal procedure possible other than a special election to determine the winner of said election?"

In considering the second question presented first, we must determine whether or not under the facts of this case there was in fact an election to the office of state representative. In case of a tie vote, the election fails. The court, in State ex inf. Smith, 152 Mo. 512, (overruled on

other grounds) made this clear where it said at page 521:

"The attempted election of his successor in 1898 failed by reason of a tie vote. No successor was then elected and hence none qualified. Therefore, no vacancy existed or occurred in the office. The effect was the same as if no election for a successor had been held in 1898.
* * * *"

We find a more detailed discussion of this question in *State ex inf. v. Kramer*, 150 Mo. 89, where it was held that the term "election" means the act of choosing performed by the qualified people, and that the people alone can choose a public official at an election. The Court made the following statement at pages 96 and 97:

"* * *None could be elected unless he received a greater number of votes than were given for any other candidate. The term election must mean the act of choosing, performed by the qualified electors, in conformity with the requirements of the Constitution and laws regulating the manner in which the choice shall be made. If, therefore, the legal electors on the day appointed shall fail to make a choice, it is confidently believed that no other authority of the State can, at any other time, make good this defect. * * *"

And further on page 100 and 102:

"* * *So as the framers of the constitutional amendment of 1834 never attempted to make any provision for deciding in a case of a tie for the office of clerk of the county court, but left it to the people to elect, there is no spirit or meaning to be invoked, nothing to which it could attach or throw light upon. * * *

"Under the Constitution of 1875 the General Assembly was expressly given power to prescribe

by law how a tie between candidates for judge or clerk of a court of record should be determined, but as to all other ties, the Constitution expressly declares how they shall be decided and does not authorize the General Assembly to ~~to~~ otherwise provide, or else it makes no provision for them and does not authorize the General Assembly to do so, but requires such officers to be elected by the people. This must have been intentional and not an oversight, for in section 30 of article VI, the minds of the framers of the Constitution were directed to ties for judges of courts of record, and in section 40 of the ~~same~~ article they were directed to ties for clerks of courts of record. Section 37 of article VI, relating to justices of the peace, comes in between these two sections of article VI, and therefore the question of ties can not fairly be said to have been in mind when section 30 was adopted, out of mind when section 37 was adopted, and in mind when section 40 was adopted. It was plainly intentional. Being left in this shape by the organic law, neither the General Assembly nor the courts have a right to supply an omission, if it could be so considered, either by express legislation or by judicial interpretation, but their duty is to enforce the law and require all such persons to show that they had been elected by the people, and failing so to show, to execute the law applicable to cases where there is an intrusion into a public office."

See also State ex rel. Guernsey v. Melike, Sup. Ct. of Wisc., 51 N.W. 875, where it was held that neither candidate was elected because of a tie vote and that the incumbent held over, and State ex rel. Cherrvoweth v. Action, Sup. Ct. of Mont., 77 Pac. 299, where it was declared that there was no election in the case where an equal number of votes were cast for each candidate.

The legislature, in the situation arising in the case at bar, did recognize that an officer must be chosen by the people and that a tie vote at an election has the same effect as no election. The provisions of Section 11467, RSMo. 1939, make

this evident by requiring the Governor to call a special election where candidates for the office of state representative receive the same number of votes at the general election. Therefore, neither of the candidates in question have been elected to said office and the withdrawal of one candidate would not have the effect of electing the other. In this connection, Section 11467 must be followed in order that a state representative may be chosen by the people of Lafayette County.

However, in the case where two candidates for the office of state representative receive the same number of votes in the county at the general election but a question concerning the legality of a number of such votes has arisen, we must then direct our attention to another procedure.

A procedure by which such elections may be contested is found in the Missouri Revised Statutes Annotated, Sections 11,675.8 through 11,675.18.

The Constitution of Missouri relating to the legislative department provides in Article III, Section 18 that each house shall be the sole judge of the qualifications, election and returns of its own members. An identical provision is found in the Constitution of the United States, Article 1, Section 5, Clause 1, to the effect that each house shall be the judge of the election, returns and qualifications of its own members.

Finding no Missouri cases in point on the question in consideration, we must look to the cases arising under the United States Constitution and in those states having similar constitutional provisions. The general rule applicable is set out in 59 C.J., Section 53, at pages 85 and 86 as follows:

"Under constitutional provisions to the effect that each house shall have power to judge of the qualifications and elections of its members, each branch of a state legislature has the sole power to judge of the election and qualification of its own members and may take such proof and incur such expenses as may be reasonably necessary for it to decide a contest of office. The decision of the legislature is conclusive upon the courts, and its authority to pass upon membership continues throughout the term. The courts have no jurisdiction as to the contest of a legislative election except to the extent that such jurisdiction is specifically conferred. * * * * "

The discussion of the law in 54 Am. Jr., Title U.S., Sec. 17, page 534, is helpful and is as follows:

"While the Constitution prescribes certain requirements as to age, citizenship, and residence, in order to be eligible to be seated as a member of Congress, Article 1, Section 5, thereof, providing that 'each House shall be the judge of the elections, returns, and qualifications of its own members,' constitutes each house of Congress the sole and exclusive judge of the election and qualifications of its own members and deprives the courts of jurisdiction to determine those matters. It is within the discretion of the Senate whether to seat one who presents himself claiming rights of membership, pending an investigation of and adjudication upon the validity of his election. Whether a Senator or a Representative has been elected in the constitutional way is not a judicial question for the courts to determine, but is a matter resting entirely with the Senate or the House of Representatives as the case may be. Hence, the state courts have no jurisdiction to determine the legality of the election of a member of Congress, or to determine whether a successful candidate for Congress is disqualified because of violation of a state corrupt practices act. However, the exclusiveness of the power of Congress in respect of the election and qualification of its members does not deprive the courts of jurisdiction to compel state election officials to comply with the state laws and to perform their ministerial duties in connection with elections of members of Congress.

"In deciding on the election and qualification of its members, each House has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases; and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify, that he would if the case were pending before a court of judicature. * * * *"

In David S. Barry et al. v. United States of American ex rel. Thomas W. Cunningham, 73 L. Ed. 867, the United States Circuit

Court of Appeals for the Third Circuit interpreted the above provision of the United States Constitution where it said at pages 871 and 872:

"First. Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers which are not legislative but judicial in character. Among these is the power to judge of the elections, returns and qualifications of its own members. Art. 1, Section 5, cl. 1. 'That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections.' *Reed v. Delaware County*, 277 U.S. 376, 388, 72 L.ed. 924, 926, 48 Sup. Ct. Rep. 531. Exercise of the power necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally, to render a judgment which is beyond the authority of any other tribunal to review. In exercising this power, the Senate may, of course, devolve upon a committee of its members the authority to investigate and report; and this is the general, if not the uniform, practice. When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate. But undoubtedly, the Senate, if it so determine, may in whole or in part dispense with the services of a committee and itself take testimony; and, after conferring authority upon its committee, the Senate, for any reason satisfactory to it and at any stage of the proceeding, may resume charge of the inquiry and conduct it to a conclusion or to such extent as it may see fit. In that event, the limitations put upon the committee obviously do not control the Senate; but that body may deal with the matter, without regard to these limitations, subject only to the restraints imposed by or found in the implications of the Constitution. * * * "

A further discussion is found in *Keogh v. Horner*, Governor of Illinois, 8 Fed. Sup. 933, where the District Court of the Southern Division of Illinois said at page 935:

" * * * If the Governor refused or was prohibited from issuing such certificates of election and the situation was presented to the House of Representatives, I do not doubt but what the House would have the right to seat the members elected without any certificate just as it could refuse to seat the members with a certificate, if it chose so to do. In other words, the power of the respective Houses of Congress with reference to the qualifications and legality of the election of its members is supreme. The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found, controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected, or to interfere with the Governor in furnishing them a certificate or commission as to what the canvass shows with reference to their election."

The state case of *Burchell v. State Board of Election Commissioners et al.*, 68 S.W. (2d) 427, also reaches the above conclusion. Said case was in the Court of Appeals of Kentucky and we cite from the opinion at page 428:

"* * * Article 1, Section 5, of the Constitution of the United States, provides that 'each house shall be the judge of the elections, returns, and qualifications of its own members.' Under this section of the Constitution, jurisdiction to determine the right of a Representative in Congress to a seat is vested exclusively in the House of Representatives, and a state court has no power to determine the right or to adjudge that a particular candidate has been elected. *Barry v. United States*, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867; *State ex rel. v. District*

court, 50 Mont. 134, 145 P. 721; Britt v. Board of Canvassers, 172 N.C. 797, 90 S.E. 1005; Wheeler v. Board of Canvassers, 94 Mich. 448, 53 N.W. 914."

Other state decisions to the same effect are Covington v. Buffett, 90 Md. 569, 45 A. 204; State ex rel. O'Donnell v. Tissot, 40 L. Ann. 598, 4 So. 482; State ex rel. Ruh v. Frambach, 47 N. J. L. 85; State ex rel. Smith v. District Ct., 50 Mont. 134, 145 P. 721, and People ex rel. Sherwood v. State Canvassers, 129 N.Y. 360, 29 N.E. 345, 14 L.R.A. 646, where the court said:

" * * * * The courts cannot interfere with this jurisdiction of the senate. Whatever may be determined here or elsewhere as to the election or qualification of the relator, or the result of the election in the 27th senatorial district, when the senate convenes, and not until then, it will have absolute jurisdiction of the whole subject, and may determine which of the two persons claiming seats therein was duly elected and qualified to sit therein; and it may determine that one was ineligible, and that the other was not elected, and that thus there is a vacancy in that district calling for a new election. * * * *"

The legislature is authorized to take such steps and proceed in such manner as may be necessary under the circumstances to obtain the information upon which to make a determination concerning the election of one of its members. The legislature may require the attendance and examination of witnesses in order to determine the facts or it may charge a committee of its members with the authority to investigate and report its findings. (Barry v. United States ex rel. Cunningham, supra.)

The legislature may investigate these matters on its own motion. This is indicated in the election case of Reeder v. Whitfield, of Kansas, Contested Election Cases - Bartlett 1834 - 1865, where it was stated in the legislative report of the Congressional Committee at pages 189-190 of the above volume:

"But this is not all. This house needs no parties in court, or names on the record, to guard its own rights and privileges; nor any

extrinsic action to quicken it in the exercise of the exclusive power to judge of the 'election returns, and qualifications' of those who claim seats on this floor; and they may institute, and often have instituted, investigations of the right of members to seats, without any contestant at all. It is not only their right, but their duty, to see that no one shall occupy a seat on this floor whose title is imperfect, and to investigate, of their own motion, whenever there is a reasonable doubt cast upon the case."

The statutory procedure for contesting elections between candidates for the office of state representative, as set out above, is not unconstitutional under the prevailing view but is merely regarded as a method of preparing or securing evidence which may be submitted to the legislature for such consideration as it may be given. The case of *State ex rel. Angus Haines v. D. B. Searle*, Judge of the District Court, 59 Minn. 489, where it was said at page 492:

"There is no force in the suggestion that, as thus construed, the act is in conflict with the Constitution, Art. 4, Section 3. It in no way interferes with the right of the legislature to judge of the election of its own members any more than would a law providing for the taking of depositions to be used on the trial of the contest before that body. It binds nobody and determines nothing. The whole matter is still with the legislature, who can receive or reject the evidence secured by the inspection and examination of the ballots, and, if they receive it, give it only such weight as they see fit. It is merely a convenient method of preparing or securing evidence in advance of the meeting of the legislature, instead of waiting until that body convenes; and it no more interferes with its constitutional right to judge of the election of its own members than does the law requiring the board of canvassers to give a certificate of election to the candidate receiving the highest number of votes. See *O'Ferrall v. Colby*, 2 Minn. 180, (Gil. 148).

There is nothing in State ex rel. v. Peers, 33 Minn. 81, (21 N.W. 860) in conflict with this view. This law, as we have construed it, is a provision enacted by the legislature itself for securing or preparing evidence to be used on the trial of the contest; and, as said in the case last cited, the House may reject it altogether, and provide, if they see fit, for the re-examination of the ballots in some other way. In appointing person to examine the ballots, the court, so far from interfering with the constitutional rights of the legislature, is but carrying out its directions. * * * *

A later ruling by the Supreme Court of Minnesota is found in In re Williams' Contest, 270 N.W. 586, at page 588:

"This law, as we have construed it, is a provision enacted by the legislature itself for securing or preparing evidence to be used on the trial of the contest; and, as said in the case last cited, the house may reject it altogether, and provide, if they see fit, for the re-examination of the ballots in some other way. In appointing persons to examine the ballots, the court, so far from interfering with the constitutional right of the legislature, is but carrying out its directions."

It is quite clear that the decision of the legislature in these election matters is a final determination and is conclusive on the courts. Burchell v. State Board of Election Commissioners et al., supra; In re Mc Neill, 111 Pa. 235, 2 Atl. 341.

A statement concerning the expense of conducting such election investigations is found in Mercer et al. v. Coleman, 14 S. W. (2d) 144, where the Court of Appeals of Kentucky said at pages 145-146:

"* * * the House, being the sole judge of the election and qualification of its members, has an implied power to take such proof and incur such expenses as may be reasonably

necessary for it to decide the contest intelligently. In any contest the House may appoint its own committee to take further proof and may authorize a committee to employ legal counsel to assist them. If, instead of doing this, where other counsel has been employed and has done the work which the House might well have provided for, there is no sound reason why the House, in its discretion, may not pay for the work which has been done, which saved the committee the expense of doing this work. It is an important public matter who shall constitute the members of the legislative body of the state, which has supreme legislative authority subject to the restrictions placed upon it by the Constitution. A poor man living in a distant part of the state might be slow to incur the expense of defending a contest or of prosecuting one. But the interest of the state being greater than the interest of the individual, the custom has been, both in the Congress of the United States and in the state Legislature, for the House in which the contest is pending to make such appropriation as it sees proper for the expenses of the contest as constituting a proper part of the contingent expenses of the body. * * *

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that, where two candidates for the office of state representative receive the same number of votes in the county in the general election but a question concerning the legality of a number of such votes has arisen, the state house of representatives is authorized under the provisions of the Missouri Constitution and the prevailing case law in other states to investigate the matter in any way it should deem necessary and upon its own motion and make a final determination which is not subject to review by the courts. The statutes now in existence which set up a procedure by which

such elections can be contested should not be considered unconstitutional. When said procedure is employed it should be considered as an aid to the house of representatives in securing the necessary facts with which to make a determination and which may be given such weight and consideration as is deemed appropriate by the state house of representatives or may be rejected and disregarded altogether.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:LR

BONDS:
COUNTY COURT:
COUNTY TREASURER:

County court is prohibited by Sec.
26(a), Art. VI of Constitution,
from becoming indebted exceeding
in any year the income and revenue

provided for such year, and contract between county and surety company for payment over 4 year term of premiums on county treasurer's bond, given for protection of school fund, does not bind county for more than one year. County court may in any year set bond required of treasurer for protection of school money.

January 12, 1948



Honorable Ralph Baird
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading, in part, as follows:

"There follows an outline of the facts and request for an opinion thereon in relation to power of the Jasper County Court to reduce the amount of the school fund bond given by the Jasper County Treasurer during his term of office. His term of office began January 1, 1947, and will expire December 31, 1950.

"Mr. Mote entered into a general fund bond in the amount of \$60,000, the same being a surety bond. He entered into another bond, a school fund bond, in the amount of \$375,000. You are familiar with the liquidation of the accumulated funds during the current year, which in this county, was in a sizeable amount. The County Court believes that the best interests of the people will be sufficiently served by a reduction in the amount of the school fund bond from \$375,000 to \$200,000. The purpose of the County Court in seeking this reduction is to save the county something on the high annual payments.

Honorable Ralph Baird

"The surety company contends the County Court does not have the power to reduce the bond during the Treasurer's term of office. The company insists that it would gladly reduce the bond and let the County realize the savings if the same could be done, but feel that if such mechanics are gone through the surety company would still remain liable for the original higher amount both on the theory that the premium was fixed and a bond given for the four-year term, with the County permitted to pay annually installments for its own convenience, and also for the aforesaid reason that there is no authority for such reduction.

* * * * *

Section 26(a) of Article VI of the Constitution of Missouri provides as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

This section is substantially a reenactment, in part, of Section 12 of Article X of the Constitution of 1875.

In the case of Ebert v. Jackson County, 70 S. W. (2d) 918, the Supreme Court of Missouri held that a contract whereby the county agreed to pay a total rental of \$4,320.00 for a room in Kansas City, Missouri, at a monthly rental of \$90.00, payments to be made on the first day of each month, violated Section 12 of Article 10 of the Constitution. The court said, l. c. 920:

"The contract was an effort to anticipate the income and revenue of the county for several years following the year the contract became effective. It created a debt within the meaning of said section of the Constitution, and is void."

Since under the provisions of Section 26(a) of Article VI of the Constitution of Missouri, a county is not allowed to become indebted in an amount exceeding in any year the income and

Honorable Ralph Baird

revenue provided for such year, and the court has held that under such constitutional provision the county court is not allowed to anticipate the income and revenue of the county for several years following the year a contract becomes effective, we believe that the contract in the present case between the county and the surety company, whereby the county was to pay the premiums on the treasurer's bond, was a valid and binding contract for only one year. Therefore, the county is under no obligation to pay the premium on the bond of the treasurer which was the subject of such contract.

Since the contract was valid for only one year and is not now binding upon the court, it is clear that the county court may now, under the provisions of Section 10400, Laws of Missouri, 1945, page 1708, determine the amount of the bond that is to be given by the treasurer for the protection of such funds.

CONCLUSION

It is the opinion of this department that the County Court of Jasper County could not, during the year 1947, enter into a contract with a surety company whereby the county was to pay the premiums on the treasurer's school bond for a period of four years, so as to bind the county for a longer period than one year, and the county is not liable to pay such premiums for years other than 1947.

It is further the opinion of this department that the county court may now require a bond in such amount as it deems proper for the treasurer's school bond, under the provisions of Section 10400, Laws of Missouri, 1945, page 1708.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

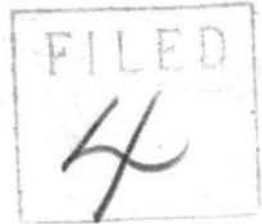
J. E. TAYLOR
Attorney General

CBB:HR

Copy to Mr. Smith

SHERIFFS: Several questions regarding salaries of sheriffs in counties of the second class.

March 15 1, 1948



3/16

Honorable Ralph Baird
Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This is in reply to your request for an opinion relative to the salaries and fees of sheriffs in counties of the second class.

As there are several questions embodied in your request we will take them up one by one.

(1). The magistrate in the eastern district of Jasper County usually sits at Carthage but holds court about one day in each week at Webb City. The sheriff reports daily to the magistrate courtroom at Webb City before continuing on to the courthouse at Carthage. Your question is whether or not the sheriff is entitled to mileage for this trip. In answer to this I refer you to the provisions of House Bill No. 939 enacted by the 63rd General Assembly, Laws of Missouri, 1945, page 1572, Section 7, which reads, in part, as follows:

"The sheriff and his deputies shall be reimbursed out of the county treasury, at the rate of five cents per mile for each mile actually and necessarily traveled, in this state, in the performance of their official duties. When mileage is allowed, it shall be computed from the place where court is usually held, and when court is usually held at one or more places, such mileage shall be computed from the place from which the sheriff or deputy sheriff travels in performing any service. * * * * The county court shall examine every claim filed for reimbursement, and if found correct, the

county shall pay to the officer entitled thereto, the amount found due as mileage." (Underscoring ours.)

Under the provisions of the above section it is our opinion that the sheriff is not entitled to mileage reimbursement for traveling from his home to the courtroom at Webb City. It should be pointed out that the travel of the sheriff must actually and necessarily be in the performance of his official duties, and it is the duty of the county court, under the above statute, to examine the claims for reimbursement and to pay them if they are found to be correct. We believe that this would be a question of fact to be determined by the county court.

(2) The county has employed certain deputy sheriffs and assigned them to various courts in the county. You ask if the sheriff is entitled to the \$3.00 per diem for the attendance of the deputy sheriffs upon these courts. If the county court has assigned these deputies to the various courts, we believe that it may be fairly assumed that their attendance has been directed by the court desiring their attendance. Section 2034, R.S. Mo. 1939, as amended, now reads:

"The several sheriffs shall attend each court held in their counties, when so directed by the court; and it shall be the duty of the officer attending any court to furnish stationery, fuel, and other things necessary for the use of the court whenever ordered by the court."

Section 13411, R.S. Mo. 1939, providing for fees of sheriffs, reads, in part, as follows:

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day3.00."

In an opinion rendered by this department to Honorable Ralph H. Duggins, Prosecuting Attorney of Saline County, under date of January 22, 1948, a copy of which I am enclosing, it provides, in the main, that the fee is properly allowed to the sheriff and not to the deputy for the deputy's attendance upon courts of record. Therefore, we believe that even though the

deputies are on a straight salary basis the sheriff is entitled to the fee for the deputy's attendance upon courts which have directed their attendance. However, the sheriff would not be entitled to the per diem for his own personal attendance unless his attendance had been directed by the court.

(3) Is the sheriff allowed to retain the fees paid for attendance upon the magistrate courts above and beyond the \$3900.00 allowed for his work in civil matters? We fail to see that there should be any distinction made in the fees collected for his attendance upon magistrate courts so as to, in fact, increase his salary considerably more than House Bill No. 939, Laws of 1945, apparently contemplated. It is a general rule of law that before an officer has authority to charge fees for his services he must be able to point to a statute authorizing such charge. *Nodaway County v. Kidder*, 129 S.W. (2d) 857. We are unable to find any statute providing that these fees should be any different than the other civil fees collected by the sheriff so that his whole compensation, in fact, should not be more than \$7800.00.

(4) You ask if the opinion under date of January 3, 1947 (Wilson), rendered to Honorable John A. Eversole, Prosecuting Attorney of Washington County, is applicable to a county of the second class. We believe that this opinion is applicable to counties of the second class as there is nothing in the facts, as outlined by your letter, which is essentially different as to make out a different case for second class counties.

(5) We further believe that the opinion under date of August 26, 1946, rendered to Honorable Gordon R. Boyer, Prosecuting Attorney of Barton County, is applicable to counties of the second class as the county court is not a court of record in second class counties.

Respectfully submitted,

JOHN R. BATY

. Assistant Attorney General

APPROVED:

J. E. TAYLOR *JET*
Attorney General

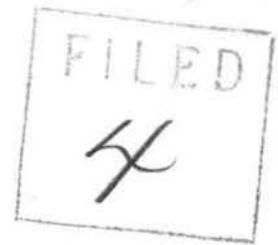
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EM
2nd month

MUNICIPALITIES: Authority of City of Carthage to install parking
COUNTIES: meters around county square.
MOTOR VEHICLES:

April 6, 1948

H-15



Honorable Ralph Baird
Prosecuting Attorney
Jasper County
Joplin National Bank Building
Joplin, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"Enclosed please find certified copy of order of the Jasper County Court under date of March 12, 1948, and photostat of certified copy of order of the Jasper County Court under date of May 16, 1895, and certified to on April 6, 1946. Also copy of my opinion given to the Jasper County Court dated November 3, 1947, in accordance with request of the Jasper County Court that I obtain an opinion from your office.

"At the time of writing my opinion, I did not have before me a copy of the 1895 order. It is my opinion that this does not change the situation. However, I request that you examine these instruments and my opinion and advise me as to whether you hold a contrary view."

The certified copy of order of the County Court, attached to your request and dated March 12, 1948, merely directs the Prosecuting Attorney to request an opinion of the Attorney General of the State of Missouri as to whether the City of Carthage has the right and privilege to install parking meters on the inside curb of the public square on county property.

The photostatic certified copy of an agreement and order of the County Court, dated May 16, 1895, shows wherein the City of Carthage and the County Court of Jasper County, Missouri, entered into an agreement in which the County Court released a strip of land twenty-five feet wide around the county

square, upon which the courthouse is located, to the City of Carthage in order that the city could widen the streets around the public square, which prior thereto were only fifty feet wide. Furthermore, the city agreed to assume all costs of construction and maintenance of said addition to the street and relieve the county of such assessment by reason of owning the land upon which the courthouse is situated. Furthermore, it was agreed that said twenty-five foot strip of land shall be used only as a public driveway, and upon which there shall not be constructed any railway or other track, nor shall there be laid thereunder any water, gas or other main, or pipe of any nature whatsoever. We fail to see wherein the foregoing order of 1895 in any manner has any bearing upon the question in the instant case. Even assuming that it is a valid and binding order for the sake of this opinion, the installation of the so-called mechanical parking meters will in no manner violate any of the provisions of that order.

In rendering this opinion, we more or less must follow the same line of reasoning and authorities set forth in your opinion to the County Court. It is well established that, while considerable revenue will be derived by the installation of said parking meters, the appellate courts have held that the primary purpose of installing said parking meters is for police regulation. The Springfield Court of Appeals, in *Wilhoit v. City of Springfield*, 171 S.W. (2d) 95, 1.c. 99, after a lengthy discussion and citing many authorities to support the contention that the installation of said parking meters is for police regulation, said:

"From the foregoing observations it is our conclusion that the ordinance with which we are concerned, providing for the zoning of the streets of the city or parts thereof, placing time limits on parking and providing for the installation of parking meters for measuring the time, is a valid exercise of the city's police power and does not illegally or unreasonably interfere with or wrongfully deprive plaintiffs of any right or privilege that they may have as abutters. (Cases cited.)"

Also, in *State v. City of Mexico*, 197 S.W. (2d) 301, 1.c. 303 and 304, the court, in holding that the regulation of parking of automobiles on streets by means of parking meters is a valid

exercise of the police power of the city, said:

"The regulation of the parking of automobiles on its streets by a city is a valid exercise of the State's delegated police power. City of Clayton v. Nemours, 353 Mo. 61, 66(3), 182 S.W. (2d) 57, 59(4), appeal dismissed, 323 U.S. 684, 65 S.Ct. 560, 89 L. Ed. 554; City of Clayton v. Nemours, 237 Mo. App. 167, 180, 164 S.W. (2d) 935, 942(16); Nemours v. City of Clayton, 237 Mo. App. 497, 509, 175 S.W. (2d) 60, 65(1, 2). This is also true of such regulation by means of parking meters. Wilhoit v. City of Springfield, 237 Mo. App. 775, 784, 786, 171 S.W. (2d) 95, 98(2,9). Additional authorities are cited in Bowers v. City of Muskegon, 305 Mich. 676, 9 N.W. 2d 889; Cassidy v. City of Waterbury, 130 Conn. 237, 33 A. 2d 142; Hickey v. Riley, Or., 162 P. 2d 371; Kimmel v. City of Spokane, 7 Wash. 2d 372, 109 P. 2d 1069; Annotations, 130 A.L.R. 316; 108 A.L.R. 1152, 72 A.L.R. 299. The instant record presents no issue that the ordinance before us is aught but a valid exercise of the police power of the City of Mexico."

In the foregoing decision, State v. City of Mexico, the Supreme Court held the City of Mexico, a city of the third class, (we assume Carthage is also a third-class city) has exclusive authority under the law to regulate motor vehicles and their use on public highways in said city. In so holding, the court said:

"The State of Missouri has delegated to the City of Mexico as a city of the third class authority to prevent the obstruction of its sidewalks and streets by vehicles (Sec. 6952, R.S. 1939, Mo. R.S.A.) and, along with other cities of the State, specific authority to '* * * by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; * * * regulate the parking of

vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical * * * .' Laws 1943, pages 659-661, amending Sec. 8395, R.S. 1939, Mo. R.S.A. Said Sec. 8395 is a part of Art. I of Chap. 45, R.S. 1939, Mo. R.S.A. Section 8366 thereof provides in part: 'This article shall be exclusively controlling on the * * * regulation * * * of motor vehicles, their use on the public highways' et cetera. And Sec. 8367, Id., entitled 'Definitions,' defines 'Highway' as: 'Any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.'

While your request is vague as to just where the parking meters are to be located, I am now informed by you that the meters are to be installed upon the sidewalk constructed by the County Court referred to in the foregoing certified photostatic copy of order of the County Court. The sidewalk referred to is located between the courthouse square and the strip of land released by the County Court to the City of Carthage for street purposes. Said sidewalk has been continuously used as other sidewalks in the City of Carthage by pedestrians since its construction.

There is an abundance of authority holding that the right of a city to regulate extends to all public highways, *de jure* or *de facto*, that it makes police power applicable to private land when said land is used as a *de facto* public highway. See *City of Clayton v. Nemours*, 182 S.W. (2d) 57, 1.c. 60. Also, *State ex rel. Audrain County v. City of Mexico*, 197 S.W. (2d) 301, 1.c. 304.

In the *City of Clayton v. Nemours*, 182 S.W. (2d) 57, Glenridge Avenue was established as a private highway, however, it was devoted to a public use by the owners thereof, although not dedicated to public use by said owners. The court held, in so devoting the use of their property, the owners constituted Glenridge Avenue a de facto public street and was subject to reasonable municipal police regulations, including the parking of automobiles.

The Supreme Court has heretofore held in *State ex rel. Audrain County v. City of Mexico*, supra, that the City of Mexico had the power to exercise police power to install parking meters on that portion of land owned by the county knowingly permitted by the county to be used as a street. We are convinced that the same rule is applicable to sidewalks. The sidewalk in this instance was constructed by your County Court, but ever since has been used as a public highway by pedestrians and is subject to regulation by the city as other sidewalks and highways. Section 6952, supra, specifically vests authority in the city to regulate sidewalks, as well as streets, avenues, alleys and other public places. *McQuillin, Municipal Corporations*, Second Edition, Vol. 4, Section 1390, in part, reads:

"The municipality has the same control over the sidewalk as any other part of the street, and this is so although the sidewalk was built by the abutting owner."

The great weight of authority holds that the word "street" includes sidewalks, especially is this true in the absence of an intent to not include sidewalks. In Vol. 44, C.J., Section 3598, page 883, we find the following general principle of law:

"The word 'street,' as ordinarily used, includes a sidewalk, although it is sometimes used in its restricted sense as including only the roadway."

See also *Knapp, Stout & Company v. Transfer Railway Company*, 126 Mo. 26, l.c. 34-35.

CONCLUSION

Therefore, it is the opinion of this department that the City of Carthage, upon enacting the proper ordinance, may install parking meters on the sidewalk around the courthouse square, which sidewalk was constructed by the County Court and has been used ever since by pedestrians as other sidewalks are in the City of Carthage.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

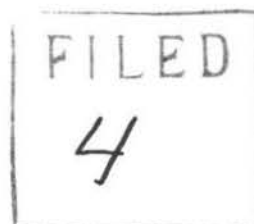
J. E. TAYLOR
Attorney General

ARH:LR:ir

COUNTY ASSESSORS:
SECOND CLASS COUNTIES:
FEES AND SALARIES:

Fees earned by county assessors in second class counties for certifying copies of assessments of personal property, and merchants and manufacturers assessments on property taxable in a city to appropriate city officials may be legally retained by assessors in addition to salary provided by law, and need not be paid into the county treasury

July 17, 1948



Mr. Ralph Baird
Prosecuting Attorney
Jasper County
Joplin National Bank Building
Joplin, Missouri

Dear Mr. Baird:

We have your recent letter in which request an opinion of this department. Your letter is as follows:

"Section 10996.12-- Compensation to Assessors in Second Class Counties in Lieu of Fees-- Disposition of Fees,' provided that the county assessor 'in second class counties shall receive as compensation for his services, as provided in Section 1 of the Act, the sum of \$5000 annually in lieu of the fees provided in said section 1* *.'"

"Section 1,' referred to above in Section 10996.12 is Section 10996.11 and in the latter a certain fee schedule is set out.

"Missouri R. S. A. Section 6719, 'County Assessors to certify assessment to council,' provides that the county assessor shall make out a return to the Board of Appraisement of a second class city in books to be furnished by the city copy of that part of the county assessor's books showing the assessment of personal property subject to taxation within such city, and also a true copy of the assessment of merchants and manufacturers may be subject to taxation by such city. This section further provides that the county assessor shall receive 10¢ per 100 words to be paid by the city for making such copy.

"Section 10996.11 lists no schedule for the assessment in regards to returning the copy of the county's assessment books to the second class city, as above set out in Section 6719.

Mr. Ralph Baird

"The point has been raised that inasmuch as the Jasper County Assessor extends this copy for the city of Joplin on county time and from county records and reports and through the use of county equipment (books of course furnished by the city) that the compensation under Section 6719 should be paid into the county treasury and used to pay the compensation of the assessor and his deputies, as provided in Section 10996.12, and not be retained by the county assessor as compensation additional to the \$5000 per annum specified in Section 10996.12.

"Attached herewith is copy of letter from H.W. Wiggins, Auditor of Jasper County, asking for an opinion in the matter as to whether these fees should be paid to the county and retained by them or should be paid to the assessor and retained by him, and request that you provide an opinion in the matter at your earliest convenience."

Section 10996.12, R. S. A. Mo. 1939, being the same as Section 2 of the Act providing for the fees of county assessors in second class counties, appearing in Laws of Mo. 1945, p. 1532, provides as follows:

"SALARY.- The county assessor in counties of the second class shall receive as compensation for his services as provided in Section 1 of this act the sum of \$5000.00 annually in lieu of the fees provided in said Section 1, to be paid in equal monthly installments out of the county treasury. All fees to be paid by the state as provided in said Section 1 shall be paid into the county treasury and shall be used to pay the compensation of the assessor and his deputies as provided in this act."

The last sentence of said Section 2 above quoted, which provides for the payment of certain fees payable by the state into the county treasury to be used for the payment of the compensation of the assessor and his deputies, refers specifically to fees provided for by Section 10996.11 R. S. A. Mo. 1939, which is the same as Section 1 of the Act providing for fees of county assessors in second class counties (Laws Mo. 1945, p. 1552) and to no other fees.

Mr. Ralph Baird

Said last-mentioned Section 1 of said Act (Laws Mo. 1945, p. 1552) provides for fees payable, one-half by the state and one-half by the county, for the performance of certain specified duties and is as follows:

"The fees for services of the county assessors in counties of the second class shall be thirty cents per list and six cents per entry for making real estate and tangible personal books, all the real and tangible personal property assessed to one person to be counted as one name; twenty-five cents for each merchants tax statement taken and entered in the tax book as required by Section 11309 of an act of the Sixty-third General Assembly known as House Committee Substitute for House Bill No. 536; twenty-five cents for each manufacturers tax statement taken and entered in the tax book as required by Section 1 of an act of the Sixty-third General Assembly known as House Committee Substitute for House Bill No. 539 approved November 30, 1945; and ten cents for each statistical list of land acreage and other accompanying agricultural statistics filed by the assessor with the state department of agriculture as required by Section 14030, Revised Statutes of Missouri, 1939; one-half of the above fees to be paid by the county and one-half to be paid out of the state treasury, but to be deposited in the county treasury of the respective counties as hereinafter provided. The assessor shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment books; provided, that nothing contained in this act shall be so construed as to allow any fee per name for the names set opposite each tract of land assessed in the numerical list."

There can be no doubt about the proposition that the \$5000 yearly salary provided for in the aforesaid Section 2 is in lieu of the fees provided for in the aforesaid Section 1 payable by the state and the county, and that these fees are to be paid into the county treasury, to be applied to the payment of said salary, and that said fees are not in addition to the \$5000 salary.

However, another fee schedule for payment for services performed by assessors in counties of the second class rendered to cities is set forth in said Section 6719, R. S. A. Mo. 1939. Said section is as follows:

Mr. Ralph Baird

"The assessed valuation of real estate and personal property in any such city for taxation for municipal purposes shall not be greater than the assessed valuation thereof for state and county purposes, as fixed by the county assessor. The county assessor shall make out and return to the board of appraisement of such city in books to be furnished by the city, on, or before the twentieth day of January annually a copy of that part of the county assessor's books showing the assessment of personal property subject to taxation within such city, and thereafter as soon as the assessment of merchants and manufacturers shall be made, shall make out, certify and return to the city board of appraisement in like manner, a true copy of that part of the said assessment of merchants and manufacturers which may be subject to taxation by such city. For making such copy the assessor shall receive ten cents per hundred words to be paid by the city. Upon failure to make, certify and return such copy to the city board of appraisement, on, or before the date mentioned, fifty per cent (50%) shall be deducted from the assessor's compensation."

The question presented by your inquiry is whether the fees provided for by this last-mentioned statute are to be paid into the county treasury to be used in like manner as the fees earned in accordance with the provisions of Section 2 of the first above-quoted Act, or, in other words, is the \$5000 annual salary, provided for by the first above-quoted section, in lieu of all fees earned by assessor, or is it in lieu only of the fees specified in Section 1 of the Act providing for the fees of county assessors in counties of the second class (Laws Mo. 1945, p. 1552.)

Taking into consideration the fact that the specification contained in Section 2 of the last-mentioned Act of fees to be paid into the county treasury to be used for payment of the \$5000 salary specifies only the fees provided for in Section 1 of said Act, and taking into consideration the utter lack of any statutory provision for the payment of fees provided for by Section 6719, R.S.A. Mo. 1939, into the county treasury, and considering the provision in said Section 6719 R.S.A. Mo. 1939 that: "* * * for making such copy the assessor shall receive ten cents per hundred words, to be paid by the city", (underscoring ours) we feel that unquestionably fees earned by assessors under the last above-cited and quoted section should not go into the county treasury, but, on the contrary, belong to the assessors as compensation for services rendered by them to the cities in question.

Mr. Ralph Baird

CONCLUSION

We are, therefore, of the opinion that fees earned by assessors by reason of work done by them for cities, in accordance with provisions of Section 6719 R. S. A. Mo. 1939, constitute compensation in addition to salary and may be retained by the assessors.

Respectfully submitted,

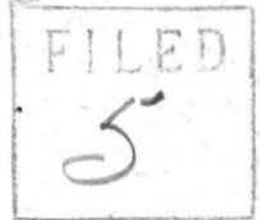
SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURTS: Magistrate must keep judgment docket; magistrate judgment not lien until transcript of judgment filed with circuit clerk.

January 6, 1948



1/27

Honorable Clyde Baugh
Judge of the Magistrate Court
Cape Girardeau County
Jackson, Missouri

Dear Judge Baugh:

This is in reply to your letter of recent date requesting an opinion from this department, which reads as follows:

"Will you please give me, - at earliest possible date - a definite ruling: As to whether it is necessary that each Magistrate Court use a Judgment Docket?"

"At the time this office was set up, we were under the impression that a Judgment Docket would not be necessary, and so, did not use one. We found that some Magistrate's were using the Judgment Dockets, and some were not - it seemed to be quite a matter of question.

"Under Senate Bill 207, Sections 114 and 115 and 116: Does the judgment become a lien only when transcribed to Circuit Court?"

"If a judgment is not a lien in Magistrate Court - then, is it mandatory to use a Judgment Docket?"

"I would like to get a definite ruling on this, in order to get the book set up, if it is absolutely necessary to use the Judgment Docket."

It is provided by Section 19, page 774 of the Laws of Missouri, 1945, that magistrate courts shall be courts of record. The judgment of a court of record is a part of the record of that court. In *Captain v. Mississippi Valley Trust Co.*, Mo. Sup., 177 S.W. 628, the court said at page 633:

"As we said in the late case of *Smith v. Moseley*, 234 Mo. 486, 495, 137 S.W. 971, 974:

"The record proper consists of the process and return, the pleadings, the verdict and judgment in civil cases."

"This is a concrete way of saying that the record proper of a cause determined in a court of record consists of those things which show the right of the court to adjudicate between the parties, the particular matter before it, and its trial and determination. * * *"

It necessarily follows then that a record of the judgments rendered by the magistrate court must be preserved. Further, Sections 1294 and 1295, R.S. Mo. 1939, require that a docket be kept on all judgments rendered by courts of record and provide the manner in which said dockets shall be set up. This duty is imposed upon the clerks of those courts. Said sections provide:

Sec. 1294. "The clerks of courts of record shall keep in their respective offices a well-bound book for entering therein an alphabetical docket of all judgments and decrees."

Sec. 1295. "They shall, during every term, or within thirty days thereafter, enter in such docket all final judgments and decrees rendered at such term in alphabetical order, by the name of the person against whom the judgment or decree was entered; and if the judgment or decree be against several persons, it shall be docketed in the name of each person against whom it was recovered, in the alphabetical order of their names, respectively."

Therefore, a docket of the judgments rendered by a magistrate court must be kept by the clerk of that court.

With reference to the further question presented concerning judgment liens, we direct your attention to Section 1269, R.S. Mo. 1939, which provides as follows:

"Judgments and decrees rendered by the supreme court, by any United States district or circuit court held within this state, by the Kansas City court of appeals, the St. Louis court of appeals, the Springfield court of appeals; and by any court of record, shall be liens on the real estate of the person against whom they are rendered, situate in the county for which or in which the court is held."

The above section provides that judgments rendered by courts of record are liens on the real estate of the person against whom they are rendered. Since magistrate courts are courts of record, it would seem that judgments rendered by those courts should be considered liens in their own right. However, we cannot fail to take notice of Sections 114 and 115, page 797 of the Laws of Missouri, 1945, which provide that a transcript of a judgment rendered in the magistrate court may be filed with the clerk of the circuit court and entered in the docket of circuit court judgments. Such magistrate court judgment, from the time of filing the transcript, shall have the same lien on the real estate of a defendant as is given to judgments rendered by the circuit court. Section 115 reads:

"Every such judgment, from the time of filing the transcript, shall have the same lien on the real estate of the defendant in the county as is given to judgments of circuit courts, and shall be under the control of the court where the transcript is filed; may be revived and carried into effect in the same manner and with like effect as judgments of circuit courts, and executions issued thereon may be directed to and executed in any county in this state; and the party obtaining said judgment, or his

attorney, shall have the option of suing out an execution out of the court where the transcript is filed, without being required to first sue out an execution from the magistrate court where said judgment was obtained, and without being required to file a supplemental transcript or certificate of the magistrate, showing the suing out and the return of an execution from the magistrate court."

The above section requires a transcript of the judgment rendered by a magistrate court to be filed with the clerk of the circuit court before such judgment is a lien upon the real estate of the defendant against whom it was rendered. Although magistrate courts are courts of record, we believe that said section, being a later and special statute relating only to magistrate courts, will be deemed a qualification of or an exception to Section 1269, a general statute, and must prevail. *Eagleton v. Murphy*, 348 Mo. 949, 156 S.W. (2d) 683; *State v. Richman*, 347 Mo. 595, 148 S.W. (2d) 796. This conclusion is strengthened by the fact that judgment liens are statutory and that the Legislature has not seen fit to expressly provide that judgments rendered by magistrate courts are liens in their own right, but on the contrary has set up a procedure by which such judgments can be made liens in the circuit court.

Conclusion.

In view of the foregoing, it is the opinion of this department that a judgment docket should be kept of the judgments rendered by the magistrate court. It is the further opinion of this department that a judgment rendered by the magistrate court is not a lien on the real estate of the defendant against whom it is rendered unless and until a transcript of such judgment is filed with the clerk of the circuit court and entered on the docket of circuit court judgments.

Respectfully submitted,

APPROVED:

DAVID DONNELLY
Assistant Attorney General

J. S. TAYLOR
Attorney General

DD:ml

MAGISTRATE COURTS: Division No. 2 of the Magistrate Court of Nodaway County is a legally constituted court.

FILED

5

March 10, 1948

3/12

Honorable Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Mr. Bartram:

This is in reply to your letter of recent date requesting the opinion of this department regarding the legal status of Division No. 2 of the Magistrate Court of Nodaway County, Missouri.

On November 18, 1946, a number of qualified voters of Nodaway County filed a petition in the Circuit Court of that county in accordance with provisions of Section 1 of an act of the 63rd General Assembly, Laws of Missouri, 1945, page 765, relating to magistrates, praying that the number of magistrates in Nodaway County be increased to one in addition to the probate judge. The record discloses that said petition was taken up by the court and found to be sufficient in form and substance. Publication in the manner prescribed by law was ordered, giving thirty days public notice preceding the hearing on said petition. The record discloses that on December 23, 1946, the petitioners filed the affidavit of publication.

The record further discloses that on December 31, 1946, a hearing was held on said petition, at which time it was adjudged and decreed by the court that the number of magistrates in Nodaway County be increased to one in addition to the probate judge. The decree of the court is as follows:

"Now on this 31st day of December, 1946, the same being a regular day of the Circuit Court within and for Nodaway County, Missouri, and a petition having been filed alleging that the needs of justice require an additional magistrate in addition to the Probate Judge in said county and state and

praying that the number of magistrates in said County of Nodaway and State of Missouri be increased from one to two, the court finds that said petition bears the signatures of a large number of taxpaying citizens and voters within and for said Nodaway County, Missouri and is in order and satisfies all legal and constitutional requirements as to form and substance, and the court further finding that notice of said hearing on said petition has been given and published according to law; and this petition coming on for public hearing, evidence is heard, and the court, being fully advised of all the premises herein, after due deliberation and consideration finds that facts and allegations in said petition are true, and that according to the needs of justice in said County of Nodaway and State of Missouri one magistrate in addition to the Probate Judge in said County of Nodaway and State of Missouri should be provided for.

"Now therefore, it is by the court considered, adjudged and decreed that the number of magistrates in said county of Nodaway and State of Missouri be and hereby is increased one in addition to the Probate Court of Nodaway County, Missouri, and that said additional magistrate be appointed by the Governor."

In accordance with the judgment of the Circuit Court of Nodaway County the Governor of Missouri, on January 13, 1947, duly appointed and commissioned Honorable Raymond Eckles as Magistrate within and for Nodaway County. The said Raymond Eckles having qualified as Judge of Division No. 2 of the Magistrate Court of Nodaway County is at the present time serving in that official capacity.

The question presented concerns the sufficiency of the petition with regard to the number of signatures appearing thereon. It is required by Section 1, Laws of Missouri, 1945, page 765, that five hundred qualified voters of the county petition the court in such matter. The record discloses that two petitions were filed bearing a total of only seventy-one signatures. However, we have been reliably informed that there

were filed in the Circuit Court of Nodaway County on November 18, 1946, petitions identical with those appearing of record bearing the signatures of more than five hundred qualified voters of Nodaway County, but that such petitions, except only those bearing the signatures of seventy-one voters, have for some unexplained reason disappeared from the files of the clerk of the said circuit court.

The statute requires that action be brought "on petition of five hundred qualified voters of the county." A court must proceed in a pending cause according to the course prescribed by law, in that the petition before it must be one, in the first instance, sufficient to initiate the exercise of its jurisdiction. The court in its decree stated that "said petition bears the signatures of a large number of taxpaying citizens and voters within and for said Nodaway County, Missouri, and is in order and satisfies all legal and constitutional requirements as to form and substance, * * *." We believe the court would not have taken jurisdiction of this action had the petition not satisfied all legal and constitutional requirements. The law presumes the reasonable and proper performance by an officer of the duties pertaining to his office. *State ex rel. and to the Use of City of St. Louis v. Priest, Clerk of the Circuit Court, et al.*, Mo. Sup., 152 S.W. (2d) 109, l.c. 112. It is well settled that any affirmative act on the part of the court implies that all facts necessary to give the court jurisdiction to render a particular judgment were duly found and that every step necessary to give jurisdiction has been taken. *Ray v. Ray*, 330 Mo. 530, 50 S.W. (2d) 142, l.c. 144; *State ex rel. v. Broadus*, 216 Mo. 336.

A judgment rendered by a court of general jurisdiction is presumed to be valid until vacated by proper proceedings instituted for that purpose, where the judgment is one within the jurisdiction of the court rendering such judgment. *Hess Warming & Ventilating Co. v. Burlington Grain Elevator Co.*, 280 Mo. 163, l.c. 185; *Jefferson City Bridge & Transit Co. v. Elaser*, Mo. Sup., 300 S.W. 778, l.c. 780; *Lewis v. Lewis*, Mo. App., 176 S.W. (2d) 556, l.c. 560, 561; *Davis v. Morgan Foundry Co.*, Mo. App., 23 S.W. (2d) 231, l.c. 233.

The judgment in the case at bar is valid on its face and affirmatively states that the petition under consideration satisfied all legal and constitutional requirements as to form and substance. It is valid and binding on all concerned.

Conclusion.

In view of the foregoing, it is therefore the opinion of this department that Division No. 2 of the Magistrate Court of Nodaway County, Missouri, is a legally constituted court.

This conclusion makes it unnecessary to consider the other questions presented.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ml

SPECIAL ROAD
DISTRICTS:
BONDS:

Special road district organized under provisions of Art. 18, Chap. 46, R. S. Mo. 1939, which issues bonds, may dissolve before such bonds are paid, and certification of amount necessary to pay such bonds is to be made by trustee, or, if he fails, by state auditor, and levy is made by county court.

March 29, 1948



Honorable Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"I would like your opinion as to the rights and duties of a Special Road District organized under the provisions of Article 18, Chapter 46, R. S. of Missouri, 1939.

"Lincoln Special Road District proposes to issue its General Obligation Bonds as provided by Section 8843. After such bonds have been voted the district would like to dissolve in accordance with Section 8855 and following sections in order to receive aid from the county in the maintenance of its roads and bridges.

"May the Special Road District, having voted bonds, elect to dissolve the special road district, and, if so, how will the monies be raised for the payment of the outstanding bonds?

"Will you please give your opinion upon the matter."

Section 8855, R. S. Mo. 1939, provides as follows:

"Whenever a petition, signed by the owners of a majority of the acres of land owned by residents of the county residing within the district organized under the provisions of this article, shall be filed with the county court of any county in which said district is sit-

uated, setting forth the name of the district and the number of acres owned by each signer of such petition and the whole number of acres in said district, the said county court shall have power, if in its opinion the public good will be thereby advanced, to disincorporate such road district. No such road district shall be disincorporated until notice is published in some newspaper published in the county where the same is situated for four weeks successively prior to the hearing of said petition."

Section 8856, R. S. Mo. 1939, provides that no such dissolution shall invalidate or affect any right accruing to such road district or to any person, or invalidate or affect any contract entered into or imposed on such road district.

Section 8857, R. S. Mo. 1939, provides for the appointment of a trustee upon dissolution of any such road district.

Section 8858, R. S. Mo. 1939, provides for the powers of the trustee, and provides, in part, that he shall have power, "under the order and direction of the county court, to exercise all the powers given by law to said road district."

Section 8859, R. S. Mo. 1939, provides that when the trustee shall have closed the affairs and paid all debts of the district, he shall pay over to the treasurer of the county all money remaining in his hand, taking a receipt therefor, and deliver to the clerk of the county court all books, papers, records and deeds belonging to the dissolved road district.

There is no prohibition in any of the above statutes against the dissolution of a special road district in a county under township organization when bonds voted by such district are outstanding and unpaid.

In the case of State ex rel. Henry v. State Auditor, 118 S. W. (2d) 19, it is apparent that that particular road district was dissolved when bonds were outstanding and would continue to be for several years. The Supreme Court had no criticism of such dissolution.

Section 8843, R. S. Mo. 1939, provides for the issuance of bonds by a special road district organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939.

This department has previously held in an opinion to Forrest Smith, under date of July 31, 1947, that Section 8843 was the exclusive authority for the issuance of bonds by a special road district organized under Article 18, Chapter 46, R. S. Mo. 1939, and that Section 8613, R. S. Mo. 1939, did not prohibit the issuance of bonds by a special road district when the bonds of a special road district and a township in which the special road district was located were voted on the same day and the proceedings for the election by the township were prior to the proceedings by the special road district. This opinion, however, did not hold that the method of levying taxes to pay the principal and interest of these bonds was contained in Article 18, Chapter 46, since at the time that opinion was written Section 8842, R. S. Mo. 1939, had been repealed.

Section 8842, R. S. Mo. 1939, provides that the board of commissioners of such a special road district had power to levy general taxes, and also had power and authority and the duty of levying special taxes for the purpose of paying the interest on bonds when it fell due and to create a sinking fund sufficient to pay the principal of the bonds at maturity; and provided that whenever the commissioners filed with the clerk of the county court a written statement that they levied such tax, the county clerk, in making out the tax books, should charge all property taxable in the district with the tax. Such section further provided that whenever the board of commissioners failed to comply with the section in making provision for the payment of principal and interest on the bonds, the state auditor, on or before the first day of May, should discharge the duties of the board of commissioners with regard to the levying of the taxes for the purpose of paying the interest and principal of the bonds.

This section presumably was repealed because the Supreme Court of Missouri, in the case of State ex rel. v. Southwestern Bell, 179 S. W. (2d) 77, held Section 8716, R. S. Mo. 1939, which was a similar section with regard to benefit assessment road districts in non-township counties, to be unconstitutional in so far as it provided for an unlimited levy of taxes by the commissioners.

Since Section 8842 has been repealed, we must look to the general law to find the method of following the injunction of that part of Section 8843, R. S. Mo. 1939, providing:

" * * * provide for the levy and collection of a direct annual tax upon all the taxable property in the district sufficient to provide for the payment of the principal and interest of the bonds so authoized as they re-

spectively become due. * * * * *

and of Section 26(f) of Article VI of the Constitution, providing as follows:

"Before incurring any indebtedness every county, city, incorporated town or village, school district, or other political corporation or subdivision of the state shall provide for the collection of an annual tax on all taxable tangible property therein sufficient to pay the interest and principal of the indebtedness as they fall due, and to retire the same within twenty years from the date contracted."

The general law providing the method is found in Section 8610, R. S. Mo. 1939, which provides, in part, as follows:

" * * * It shall be the duty of the clerk of the board of commissioners on or before the first day of May in each year, or the state auditor immediately thereafter, in case the clerk of the board of commissioners should fail or neglect, on or before the first day of May of each year, so to do, to certify to the county court of the county, or counties, wherein such road district is situated, the amount of money that will be required during the next succeeding year to pay interest falling due on bonds issued and the principal of bonds maturing during such year. On receipt of such certificate it shall be the duty of the county court, or courts, at the time it makes the levy for state, county, school and other taxes, to, by order made, levy such a rate of taxation upon the taxable property in the road district, in such county or counties, as will raise the sum of money required for the purposes aforesaid. On such order being made it shall be the duty of the clerk of the county court, or courts, to extend such rate of taxation upon the tax books, against all of the taxable property in the district in such county or counties, and the same shall be collected by the collector of the revenue at the time and in the manner, and by the same means as state, county, school and other taxes are collected. * * * * "

It is our view that under the provisions of Sections 8610 and 8858, supra, the trustee, exercising the powers given by law to road districts, is to certify to the county court the amount of money necessary to pay the interest and bonds maturing, and that if the trustee does not so certify, it is the duty of the state auditor to certify to the county court such amount.

In the case of State ex rel. v. State Auditor, supra, the Supreme Court held that under the provisions of Section 8842, supra, which was then in effect, where the trustee of a special road district organized under the provisions of Article 18, Chapter 46, and which district had been dissolved four years previously, levied, under direction of the county court, a tax rate which was insufficient to pay the current maturities with interest, that the state auditor could be compelled by mandamus to levy a sufficient tax rate to pay such current maturities with interest. Since Section 8842 has been repealed, Sections 8610 and 8858, supra, now provide the method for making such levy, and provide that the levy is to be made by the county court upon certification by the trustee, or if certification is not made by the trustee, upon certification of the state auditor.

While there is no statement of facts in your opinion request that would necessarily bring the special road district within the purview of Section 8613, R. S. Mo. 1939, we believe that the restrictions contained within Section 8613 apply only to the voting of bonds and not to the method of paying such bonds, since the payment of the bonds is enjoined by Section 26(f) of Article VI of the Constitution of Missouri.

CONCLUSION

It is the opinion of this department that a special road district which has voted bonds may dissolve, and that after dissolution the moneys for the payment of the outstanding bonds and the interest thereon are to be raised by a tax levy made by the county court upon certification by the trustee of the dissolved road district, and that if no certification is made by the trustee, such certification is to be made by the state auditor.

Respectfully submitted,

APPROVED:

C. B. BURNS, JR.
Assistant Attorney General

J. E. TAYLOR
Attorney General

ELECTIONS: Sufficiency of petition for special election to establish Public County Health Center determined from petition as amended, but supplemental petitions not permitted.

April 27, 1948

Mr. Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request is as follows:

"The County Court of Nodaway County has written me a letter asking my opinion upon a certain question and as this question will probably be a state wide question, I have told them I would prefer to write your department for an opinion in regard to the same. They have stated they would appreciate your opinion. The letter is as follows:

"The County Court of Nodaway County, Missouri, has asked your written opinion on the sufficiency of petitions filed in the County Court of Nodaway County under Section 1, Laws of 1945, page 969.

"On the 7th day of February, 1948, thirty-six petitions were filed with the Clerk of the County Court bearing a total of approximately eleven hundred names. Thereafter on the 17th day of February, 1948, the Court in regular session considered said petitions and on said date, made the following entry of record:

"A group of Petitions having been presented to the County Court of Nodaway County, Missouri, on February 7, 1948, requesting that a Sepcial Election be called, or at the General Election, to vote on a mill levy on a valuation of \$39,760,000.00 which would raise some \$795,200.00 over a twenty year period for the purpose of setting up a County Health Unit, the County Court finds many names which we believe were copied on said Petitions by some person or persons, since so many names appear not to be the genuine original signature of the person whose name appears on said Petitions.

"'Unless positive proof is furnished that these signatures are the original, having not been copied, and in full compliance with laws of the State of Missouri, the County Court of Nodaway County shall be compelled to throw out said Petitions.

M. S. Carmichael, Presiding Judge
Everett A. Gray, Associate Judge
C. H. Farnan, Associate Judge."'

"'Thereafter, a committee representing themselves to be acting officially for the petitioners, appeared and obtained the same thirty-six petitions; agreed that certain names thereon were not genuine signatures; eliminated certain names, by marking through them, from the petitions; obtained additional signatures and finally on the 20th day of March, 1948, refiled in the County Court of Nodaway County the same original petitions with corrections and amendments heretofore noted and two additional petitions.

"'Will you please furnish this Court an opinion stating whether these petitions shall be considered the same as if all of them had been originally filed and the same as if no action had ever been taken thereon.'"

Respectfully submitted,

Chester R. Lyle,
Clerk of the County Court,
Nodaway County, Mo."'

"Thanking you in advance of your consideration and opinion in this matter, I am

Yours very truly,

Emmett L. Bartram
Maryville, Mo."

The statute under which the election is proposed to be held reads as follows:

Laws Missouri, 1945, Sec. 1, page 969:

"Any county or group of counties, subject to provisions of the Constitution of the State of Missouri, may establish, maintain

and manage and operate a public county health center in the following manner: Whenever the county court or courts shall be presented with a petition signed by ten per cent or more of the qualified voters in the county or counties affected as determined by the number of votes cast for governor at the preceding general election, asking that an annual tax be levied for the establishment, building, maintaining of a public health center and the maintenance of such personnel as may be needed for the operation of such center and shall specify in their petition, the maximum amount of money proposed for said purposes, such county court or courts shall submit the question to the qualified voters of the county or counties at the next general election to be held in the county or counties or at a special election called for that purpose, first giving ninety days' notice thereof in one or more newspapers published in the county or counties, if any be so published, and if not so published, by posting written or printed notices in each township of the county or counties, which notice shall include the text of the petition and state the amount of the tax to be levied upon the assessed property of said county or counties, which tax shall not exceed one (1) mill on the dollar, for a period of time not exceeding twenty years, and be for the issue of county bonds to provide funds for the purchase of a site or sites, the erection thereon of a public health center and for the support of the same including necessary personnel; which said election shall be held at the usual voting places in the county or counties for voting upon county officers, and shall be canvassed in the same manner as the vote for county officers is canvassed."

As can be seen, this section makes no provision for an initial determination of the question of the sufficiency of the number and genuineness of the signatures and for subsequent amendments to make up any deficiency. Such provisions are found in some statutes providing for elections on the petition of a specified number of voters. See Secs. 6567, 6632 and 7075, R. S. Mo. 1939, providing for initial examination of petitions for election by city clerk in certain municipal elections.

In view of the absence of such a provision in the statute in question, the county court would have been acting properly had it passed upon the petitions as originally presented. However, since they permitted the petitions to be withdrawn and amended, we are of the opinion that they now must pass upon them as they presently stand and not consider the petitions as they appeared when originally filed.

As a general rule, a petition, such as that involved here, is not regarded as completed until the body to whom it is addressed has taken final action thereon. A signer may withdraw his signature at any time before such final action. *Sedalia ex rel. Gilsonite Construction Co. v. Montgomery*, 227 Mo. 1, 127 S.W. 50, *Dagley v. McIndoe*, 190 Mo. App. 166, 176 S.W. 243. In this case the court had taken no final action, but had merely stated that the petition would be refused, unless proof was furnished that the signatures were genuine. In view of this fact, and the fact that the court permitted the withdrawal of the petition and its amendment, its sufficiency must be determined on the basis of the present status thereof. In addition, if, as you state, there have been interlineations in amendments, they would undoubtedly be great difficulty in determining just how the petition stood when it was originally filed, and determination on that basis would probably be impossible.

As for the two additional petitions which were filed, there is no provision made for the filing of such additional petitions in the statute in question.

The question of the admissibility of supplemental petitions has never been presented to the court in this state, but it was held by the Supreme Court of Nebraska, in the case of *Ayers v. Moan*, 34 Neb. 210, 51 N.W. 830, that supplemental petitions should not be allowed in a situation similar to this. In that case the court said:

"The law does not contemplate a supplemental petition in the procedure. In courts a supplemental petition is permitted to include certain matters which have arisen since the filing of the original petition, as in an action to foreclose a mortgage for one or more installments then due. If other installments should become due before a decree is rendered they may be set up by supplemental petition. If, however, the installments set forth were due when the action was brought, a supplemental petition is not available. So in this case the petitioners must present their full petition at the outset. If, after a thorough examination

of the petition it is found to contain the necessary number of signatures of resident electors, it will be the duty of the board to call an election. If it does not contain such number, then it is the duty of such board to refuse to call the same."
(51 N.W. 1.c. 833.)

These principles are, we believe, applicable in this situation and the supplemental petitions should not be considered.

CONCLUSION

THEREFORE, it is the opinion of this department that the sufficiency of a petition for a special election for the establishment of a public county health center must be determined when the county court has permitted the withdrawal of such petition for amendments of signatures by the petition as it stands following such amendments, but supplemental petitions subsequently filed should not be considered.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

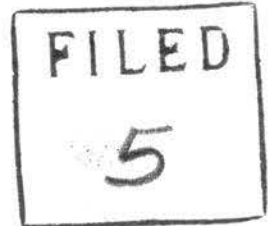
J. E. TAYLOR
Attorney General

ROADS AND BRIDGES:
SPECIAL ROAD
DISTRICTS:

Special road district cannot be organized under Art. 18, Chap. 46, R.S. Mo. 1939, when all of territory in road district constitutes all or a part or a city of the fourth class. Funds of the road district arising from special road and bridge tax cannot be spent in incorporated towns or cities.

June 25, 1948

FILED 5



Honorable Emmett L. Bartram
Prosecuting Attorney
Nodaway County
Maryville, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"It is the desire of a majority of the landowners of the town of Burlington Junction, Missouri, so I am advised, to organize a Special Road District under the provisions of Article 18, Chapter 46, R.S. of Missouri, 1939. This being a county which has adopted township organization.

"I would like your opinion as to whether such a Special Road District may be organized with all or substantially all of the lands within the boundaries of such district constituting a city of the fourth class.

"You will have in mind that Section 8840 gives the commissioners exclusive and entire control over the public highways, bridges and culverts within the district. You have previously ruled that in such case the jurisdiction of the county in such district ceases when the district is formed.

"You will understand that this matter gets to be of considerable importance as a township Road and Bridge tax is levied in each city and in most cases, I am advised, no part of such monies are expended within the cities.

"Will you please give me your opinion as to the power to incorporate such district."

Section 8836, R. S. Mo. 1939, provides for the organization of special road districts in counties operating under township organization. Said section provides, in part, as follows:

" * * * Districts so organized may be of any dimensions that may be deemed necessary or advisable, except that every district shall be included wholly within the county organizing it and shall contain at least six hundred and forty acres of contiguous territory: Provided, that the county court shall not have power to divide the territory within the corporate limits of a city having a population of one hundred fifty thousand into such road district."

In the case of State ex inf. v. Walker, 301 Mo. 115, a special road district was organized under what is now Section 8710, R. S. Mo. 1939, which is a section similar to Section 8836, supra, except that Section 8710 applies to counties not under township organization. The road district in that case included part of the city of Butler and all of the city of Rich Hill. The Supreme Court in that case held that the special road district was properly formed. Therefore, we are of the opinion that an incorporated town or city, or a part thereof, may be included in a special road district organized under the provisions of Article 18, Chapter 46, R. S. Mo. 1939, except that the territory within the corporate limits of a city having a population of 150,000 may not be divided into such special road district.

Section 8840, R. S. Mo. 1939, provides as follows:

"The township board of trustees shall, upon the organization of such commissioners, cause all tools and machinery used for working roads belonging to the districts and parts of districts formerly existing and composed of territory embraced within the incorporated district to be delivered to said commissioners, for which such commissioners shall give receipt, and such commissioners shall keep and use such tools and machinery for constructing and improving public roads and bridges. The township boards shall also cause the township treasurer to pay over to the treasurer of the

special road district all moneys in his hands belonging to the district or districts that have been merged into the special road district whenever the board of commissioners of such special road district shall make demand therefor. Said commissioners shall have sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts, within the district to construct, improve and repair such highways, bridges and culverts, and shall have all the power, rights and authority conferred by law upon road overseers, and shall at all times keep such roads, bridges and culverts in as good condition as the means at their command will permit, and for such purpose may employ hands and teams at such compensation as they shall agree upon; rent, lease or buy teams, implements, tools and machinery; all kinds of motor power, and all things needed to carry on such work: Provided, that said commissioners may have such road work, or bridge or culvert work, or any part thereof, done by contract, under such regulations as said commissioners may prescribe."

Section 7197, R. S. Mo. 1939, provides, in part, as follows:

" * * * Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city."

Since Section 7197 provides that cities of the fourth class shall exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city, and Section 8840 provides for the turning over to the board of commissioners of a special road district formed under Article 18, Chapter 46, of all the tools and machinery used for working roads belonging to the districts composed of territory embraced within the incorporated district, and provides that the township boards shall cause the township treasurer to pay over to the special road district all moneys belonging to the district or districts that have been merged in the special road district, and that the commissioners shall have the power, rights and authority conferred

by law upon road overseers, it is our opinion that a special road district organized under Article 18, Chapter 46, has the sole, exclusive and entire control and jurisdiction over the public highways, bridges and culverts within such special road district outside of the limits of incorporated cities or towns, that is, the public highways, bridges and culverts within the common road district or districts which have been formed into the special road district.

Sections 8562 and 8588, R. S. Mo. 1939, we believe, sustain the correctness of this view, in that such sections demonstrate that the Legislature intended that the streets in incorporated cities and towns should be under the exclusive control of such cities and towns. Section 8562 provides that all streets and alleys in unincorporated towns and villages shall be under the control of the county court, and Section 8588 provides for the attaching to a road district of an incorporated city or village when the city or village fails to elect officers or maintain a municipal government.

Section 8820, Laws of Missouri, 1947, page 483, provides, in part, as follows:

" * * * Provided, further, that the proceeds of such fund maybe used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

The above-quoted provision in Section 8820 is the only authorization for the expenditure in counties under township organization of moneys raised by the special road and bridge tax in incorporated cities, towns and villages. Since there is no provision for the expenditure of moneys raised by the road and bridge tax by the commissioners of a special road district organized under Article 18, Chapter 46, in incorporated cities, towns or villages, we are of the opinion that no authority for such expenditure exists.

Since a special road district organized under Article 18, Chapter 46, has no authority to spend any of its funds within an incorporated city, town or village, a special road district cannot be organized which will consist exclusively of territory within a city of the fourth class or a part thereof.

CONCLUSION

It is the opinion of this department that a special road district cannot be organized in a county under township organization when all of the territory in such special road district is within a city of the fourth class.

It is further the opinion of this department that if a special road district is organized in a county under township organization and a city of the fourth class, or a part thereof, is within such special road district, the funds arising from taxation on property within such special road district, which are turned over to the commissioners of such special road district, may be spent by such commissioners only on the public highways, bridges and culverts in such special road district which are outside of the limits of such incorporated city.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

CBB:HR

TAXATION:

SALES AND USE TAX:

MOTOR VEHICLES, ETC.:

Sales and use tax under H.B. No. 258 of the 64th General Assembly is applicable to motorcycles and motorscooters; dealer who purchases car as demonstrator is subject to tax.

July 1, 1948

FILED

5

Mr. G. H. Bates
Collector of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, wherein you submit a request for an official opinion on two questions, namely:

"1. Does motor vehicle as used in this Act apply to automobiles, busses and trucks alone, or does the wording also include motorcycles, motor scooters and such other vehicles which are required to secure titles from the Motor Vehicle Department?

"2. Frequently an automobile dealer will title a new car in the name of the firm and apply for individual license plates in order that he may use said car as a demonstrator, however, with the intention of selling said car within a period of not to exceed ninety days. When said car is titled in order to secure individual license plates, would the dealer be required to pay the sales and/or use tax, or should we hold that this is a departmental transfer not subject to sales tax?"

House Bill No. 258 of the 64th General Assembly, which will become effective on July 18, imposes a sales and use tax on motor vehicles in this state. Sub-section (b) of Section 11412 of the act provides that when an owner of a new or used motor vehicle makes application for a title or the registration of such motor vehicle to present evidence showing the purchase price paid or charged, and if the transaction was subject to tax to pay the tax to the Director of Revenue when he obtains his title. Sub-section (c) of this same section imposes a use tax on sales of such motor vehicles. The only exemptions that we find in this section, whereby motor vehicles are exempted from its provisions, are found in sub-section (d) of said Section 11412, which reads as follows:

"(d) The tax imposed by this section shall not apply to motor vehicles on account of which the sales tax provided by this act shall have been paid, nor to motor vehicles brought into this state by a person moving into Missouri from another state who shall have registered said motor vehicle in said other state at least ninety days prior to the time it is registered in this state, nor to motor vehicles acquired by registered dealers for resale, nor to motor vehicles purchased, owned or used by any religious, charitable or eleemosynary institution for use in the conduct of regular religious, charitable or eleemosynary functions and activities, nor to motor vehicles owned and used by religious organizations in transferring pupils to and from schools supported by such organization, nor where the motor vehicle has been acquired by the applicant for a certificate of title therefor by gift or under a will or by inheritance, and the tax hereby imposed has been paid by the donor or decedent, nor to a motor vehicle, for which a certificate of title is sought by the applicant, which was acquired by him within the State of Missouri in an isolated or occasional sale as defined by subsection (c) of Section 11407 of the Missouri Sales Tax Act, nor to any motor vehicle owned or used by the State of Missouri or any political subdivision thereof, nor by an educational institution supported by public funds, nor to farm tractors or motor vehicles having a seating capacity of ten passengers or more."

The term "motor vehicle," as defined in the Missouri acts applicable to motor vehicles, reads as follows, Laws of Missouri, 1945, page 1196:

" * * * 'Motor vehicle.' Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors. * * * * "

Since motorcycles and motor scooters, and other motor vehicles that are required to secure titles from the Motor Vehicle Department are "motor vehicles," then they would be

subject to the provisions of the sales and use tax act as they do not come within the exempted class specified in sub-section (d), supra.

On the question of whether or not a dealer, who takes a car out of his stock to be used as a demonstrator, should pay this tax when he makes application for title, we find from an examination of this act that the tax seems to be imposed on the person who buys the car for use. There does not seem to be any provision in the act which makes an exception to a case in which the dealer takes the car out of his stock. Nor are there any provisions in the act which would authorize a departmental transfer. The tax is imposed on the person who makes application for the title, and it was on the theory that the tax is a use tax. Under those circumstances, we think that the dealer would be liable for the tax under this act.

CONCLUSION

From the foregoing, it is the opinion of this department that sales of motorcycles, motor scooters and other motor vehicles, which are required to secure titles from the Motor Vehicle Department, except such motor vehicles as are exempted under sub-section (d) of Section 11412 of the act, would be subject to the tax therein provided.

We are further of the opinion that a dealer who makes application for a title for a new car, which he proposes to use as a demonstrator, would be liable for the payment of the tax before he may obtain title.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

TAXATION: Proceeds of use tax imposed by Paragraph (c) of
Section 11412, Mo. R.S.A., to be credited to
REVENUE: State Highway Department fund.

September 9, 1948



9-13
Honorable G. H. Bates
Collector of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion
of this department, reading as follows:

"Under H. B. 258, passed by the 64th
General Assembly, effective July 18,
1948, a use tax is imposed in Section
11412, paragraph C.

"Since this paragraph imposes a tax for
the privilege of using the highways of
this state, it was my impression that the
tax collected under this particular para-
graph should be deposited in the state
treasury to the credit of the State High-
way Department Fund. However, I find
that there seems to be some difference of
opinion in the matter, so before making
my first deposit, I am writing to ask
whether in your opinion the proceeds of
this tax should be deposited in the State
Highway Department Fund or the General
Revenue Fund."

House Bill No. 258 of the 64th General Assembly, referred
to in your letter of inquiry, now appears in part as Section
11412, Mo. R.S.A. Paragraph (c) of said section reads in
part as follows:

"(c) In addition to all other taxes now
or hereafter levied and imposed upon every
person for the privilege of using the high-
ways of this state, there is hereby levied
and imposed a tax equivalent to two per
cent of the purchase price, as defined in
subsection (b) hereof, which is paid or
charged on new and used motor vehicles
purchased or acquired for use on the high-
ways of this state which are required to
be registered under the laws of the State
of Missouri. * * * *"

It is clear that under the provisions of this paragraph, a use tax has been imposed upon owners and operators of motor vehicles for the privilege of operating the same upon the highways of the state. In these circumstances, we think it pertinent to your inquiry to direct your attention to a portion of Section 30, Article IV of the Constitution of Missouri, reading in part as follows:

"For the purpose of constructing and maintaining an adequate system of connected state highways all state revenue derived from highway users as an incident to their use or right to use the highways of the state, including all state license fees and taxes upon motor vehicles, trailers, and motor vehicle fuels, and upon, with respect to, or on the privilege of the manufacture, receipt, storage, distribution, sale or use thereof (excepting the sales tax on motor vehicles and trailers, and all property taxes,) * * * * shall be credited to a special fund and stand appropriated without legislative action for the following purposes, and no other:"

From the quoted portion of the Constitution, it seems clear that the proceeds of the use tax imposed under the statute quoted above stand appropriated to the State Highway Department fund.

CONCLUSION

In the premises, we are of the opinion that the proceeds of the use tax imposed under the provisions of Paragraph (c) of Section 11412, Mo. R.S.A., are to be deposited to the credit of the Missouri State Highway Department fund, under the provisions of Section 30, Article IV of the Constitution of Missouri.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J.E.*

TAXATION: Sales of food and drinks at cafeteria owned by
SALES TAX: manufacturing company to employees of such manufacturing company are subject to the sales tax.

November 17, 1948



Mr. G. H. Bates
Collector of Revenue
Department of Revenue
Capitol Building
Jefferson City, Missouri

Dear Mr. Bates:

This is in reply to yours of recent date wherein you submit the question of whether or not the sales tax should be imposed and collected on the sales of food and drinks to employees only of a manufacturing concern at a cafeteria owned and operated by such manufacturing concern and in which it is claimed no profits are derived from the sales of such articles. The provisions of the Sales Tax Act applicable here are found in Laws Missouri 1945, page 1866, subsection (g) of Section 11407 of the Act which defines the term "sale at retail" as follows:

"(g) 'Sale at retail' means any transfer made by any person engaged in business as defined herein of the ownership of, or title to, tangible personal property to the purchaser, for use or consumption and not for resale in any form as tangible personal property, for a valuable consideration. Where necessary to conform to the context of this article and the tax imposed thereby, it shall be construed to embrace:"

Subsection (5) of said subsection (g) reads as follows:

"(5) Sales or charges for all rooms, meals and drinks furnished at any hotel, tavern, inn, restaurant, eating house, drug store, dining car, tourist camp, tourist cabin, or other place in which rooms, meals or drinks are regularly served to the public."

Section 11408 provides, in part, as follows:

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"From and after the effective date of this Act, there shall be and is hereby levied and imposed and shall be collected and paid:

"(a) Upon every retail sale in this State of tangible personal property a tax equivalent to two (2%) per cent of the purchase price paid or charged, or in case such sale involves the exchange of property, a tax equivalent to two (2%) per cent of the consideration paid or charged, including the fair market value of the property exchanged at the time and place of the exchange."

Section 11413, of said Act provides, in part, as follows:

"For the purpose of more efficiently securing the payment of an accounting for the tax imposed by this article, the Director of Revenue shall make, promulgate and enforce reasonable rules and regulations for the administration and enforcement of the provisions of this article. * * *"

The Sales Tax Act was originally administered by the State Auditor. Pursuant to the authority conferred on him by Section 11413, supra, the State Auditor promulgated the following rule which relates to sales of food and drinks sold at a cafeteria owned by employers and sold to employees only. We refer to Rule 43 of the Rules and Regulations relating to the Missouri Sales Tax Act, effective August 1, 1941, which provides:

"When private corporations operate cafeterias, lunch rooms or dining rooms for the exclusive use of their employees, they should collect and remit the Missouri Sales Tax on all sales made to their employees even though said place of business is not open to the general public."

This rule has been in effect since 1941 and the provisions of the Missouri Sales Tax Act relating to "business" "retail sales" and sales of food and drinks have not been changed by the various general assemblies which have convened since 1941.

While a regulation or rule, which has been promulgated by an administrative official, may not have the force and effect of law, yet such regulation is persuasive on the courts as to their interpretation of the law, especially where the lawmakers have met a number of times after the rule is promulgated and do not change the acts to which the regulations may apply.

Mr. G. H. Bates

In 139 A.L.R., at page 381, the annotator, in discussing this principle said, at l.c. 381:

"It has been held that where an administrative officer has adopted a regulation defining a certain transaction as coming within the scope of the taxing statute, and the legislature subsequently re-enacted the statute without amendment in this regard, the reenactment 'amounted to a legislative confirmation of the prior existing rules of interpretation.' Bedford v. Colorado Fuel & Iron Corp. (1938) 102 Colo 538, 81 P(2d) 752. And see Typekrafters, Inc. v. Philadelphia (1938) 34 Pa D & C 82, infra, II d."

Also in 47 Am. Jur. 318, Section 14, we find the principle stated as follows:

"* * * While it has been held that where an administrative officer has adopted a regulation defining a certain transaction as coming within the scope of a sales tax statute, and the legislature subsequently re-enacts the statute without amendment in this regard, the re-enactment amounts to a 'legislative confirmation of the prior existing rules of interpretation,' the view has been taken that under the circumstances named, the legislative confirmation is merely presumed and may be overcome by a consideration of all the circumstances. * * *"

Following these principles, the regulation promulgated by the State Auditor should be persuasive as to the interpretation which we should place on the Sales Tax Act insofar as it applies to sales of food and drinks at the cafeteria which is owned by the manufacturing company and at which only sales are made to employees of the manufacturing company.

The Missouri Sales Tax Act was originally taken from the Illinois Occupation Tax Act and the definitions of many terms in the Missouri Act are the same as those in the Illinois Act especially the definition of the term "sale at retail." The interpretation of the Act by the Illinois courts should also have some weight in the Missouri authorities interpretation of the Missouri Act.

In the case of the Continental Bank Supply Company vs. International, 201 S.W.(2d) 531, the court in construing a Missouri

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statute, which was taken from a New York statute applied the foregoing principle and said, l.c. 534, subsection 5:

"* * *It was ruled in *Bridgman v. Bridgman*, 23 Mo. 272, loc. cit. 273, that the Legislature of 1835 adopted, substantially, the New York revised act regulating the arbitration of controversies. The court indicated that the construction placed on the New York act, by the courts of New York, should be given great weight by the courts of Missouri in construing the Missouri Statute."

The Illinois court has construed the Occupation Tax Act of that state under its definition of the term "sale at retail" and held that it included sales of food and drinks at cafeterias owned by employers and sold to employees only. In the case of *Continental Can Company vs. Nudelman, et al.*, 34 N.E. (2d) 397, the following set of facts were submitted to the court for determining whether or not the transactions were taxable under the Illinois Act which defined "retail sale" in identical language to the Missouri Act, the facts were, l.c. 397, 398:

"No question is raised on the pleadings and the facts are stipulated. The pertinent portions are: '(1) the plaintiffs are corporations and own, operate and conduct factories, manufacturing and business enterprises in Cook county, Illinois; (2) that for the convenience of plaintiffs and their employees the plaintiffs operate and maintain cafeterias, lunch rooms and restaurants for the feeding of their employees, all of which are situated in the various properties at which plaintiffs conduct their respective businesses; (3) that said restaurants, cafeterias and lunch rooms are not advertised to the general public nor are the public invited thereto, although occasionally some outsiders are permitted to avail of the restaurant facilities; (4) that in the operation of said restaurants, cafeterias and lunch rooms, plaintiffs serve, dispense and transfer to their employees for a valuable consideration, food and nonalcoholic beverages for physical consumption and not for resale from which they have derived no profit.'"

In passing on these facts the court held the transactions were taxable by saying, l.c. 398:

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"Under the stipulated facts, the operation of cafeterias, lunch rooms and restaurants for the purpose of selling food to their employees made appellees vendors engaged in a business which was subject to the tax."

It might be contended that since the food and drinks sold and served at the cafeterias and being only sold and served to employees that the tax was not applicable on account of the provisions of Section 5 of subsection (g) of said Section 11407 and of subsection (f) of said Section 11408. These sections contain the provision that the sales are applicable where they are sold at places in which meals and drinks, etc., are "regularly served to the public."

Referring to the last sentence of subsection (g) of Section 11407, it would be noted that the "subdivisions" of said subsection (g) are embraced within the act only when it is necessary to so embrace them to conform to the context of the Sales Tax Act. As stated above the Illinois courts have held that the term "sale at retail" as defined in the first part of subsection (g) was broad enough to include the sale of food and drinks at cafeterias such as are under consideration here. Therefore, it would not seem to be necessary to look to the subdivisions of said subsection (g) to find authority to impose the tax on the "sale of foods and drinks at cafeterias, etc.," even though they might not be served to the public. We also think that the same reasoning would apply to subsection (a) of Section 11408 because there can be no question but that the sale of food and drinks would be a sale of tangible personal property which are included in said subdivision (a).

The question of the imposition of the tax might also be raised because there is no profit in the transaction. Under the definition of the term "business" in the Sales Tax Act, subsection (c) of Section 11407 we find it to be defined as follows:

"'Business' includes any activity engaged in by any person, or caused to be engaged in by him, with the object of gain, benefit or advantage, either direct or indirect, and the classification of which business is of such character as to be subject to the terms of this article. * * *"

By this definition it will be found that a transaction to be taxable does not necessarily have to be one in which the seller derived a profit. If the sale is made with the object of "gain, benefit or advantage, either direct or indirect, it is a retail sale and would be subject to the tax regardless of the fact that there is no profit in the transaction.

Mr. G. H. Bates

In the Annotation, 139 A.L.R., page 391, the annotator in treating the case in which the sales of food at clubs and restaurants by nonprofit organizations were involved, said:

"So too, the furnishing of food and liquor to members of a social and political club and their guests was held to constitute a sale within the meaning of a statute requiring the payment of the tax upon every 'retail sale' or 'sale at retail,' under a statute defining such terms as 'a sale to a consumer or to any person for any purpose other than for sale in the form of tangible personal property,' Union League Club vs. Johnson (1941) 18 Cal(2d) 257, 115 P(2d) 425 (reversing in this regard (1940; Cal App) 108 P(2d) 487). (This case also involves the question whether the club was engaged in the 'business' of making retail sales 'with the object of gain, benefit or advantage, either direct or indirect.' The court commented that, assuming that no profit was intended or realized by the club from the operations of its dining room and bar, it did not follow that there was no 'gain, benefit or advantage' to the club, since few persons would go to a club without these facilities and they undoubtedly contributed largely to the success of such an enterprise.)"

We do not think it can be successfully contended that the employer and manufacturer carry on this business of selling and serving food and drink at the cafeteria without the object of gain, benefit or advantage either direct or indirect.

CONCLUSION

Under the foregoing authorities it is the opinion of this department that sales of food and drinks by cafeterias, owned by a corporation, to the employees of such corporations are retail sales under the Missouri Sales Tax Act and are subject to the provisions of that Act.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Shelley
PUBLIC SERVICE COMMISSION.

Taxicabs.

Certificate of Convenience and Necessity not required of persons operating "taxicabs" whose "principal" operations are within a city or suburban territory adjacent thereto.

February 19, 1948

FILED

6

7/20

Mr. G. C. Beckham
Prosecuting Attorney
Steelville, Missouri

Dear Mr. Beckham:

This will acknowledge receipt of your opinion request of February 5, 1948, which request, omitting caption and signatures, inquires as follows:

"In Crawford County, Missouri we have a number of persons who are operating taxi cab businesses. Some operate out of the City of Steelville and some out of the City of Cuba. They offer a "call and demand service" and will take customers anyplace that the customer might want to go either in the City or outside the City.

I understand that the Public Service Commission has held that such operators are required to obtain a Certificate of Convenience and Necessity to operate as a passenger-carrying motor carrier over an irregular route.

The question is whether or not persons engaged in such a business are required to have a Certificate of Convenience and Necessity. I would like to have your construction of Section 5720 RS Mo 1939 on the above question.

I might further state that a certain person who does have a Certificate of Convenience and Necessity to operate as a passenger-carrying motor carrier over an irregular route has complained about the operations above mentioned.

I might further state in my opinion that there is no way to determine whether the principal operations of such unauthorized taxi cab operators are confined to the area within the corporate limits of the respective cities out of which they operate."

The primary question propounded by your request aforesaid which is to be answered is whether the owners or operators of "taxicabs" operating in the manner set out in your letter, are subject to control by the Public Service Commission of Missouri, as set out in Article 8, Chapter 35 Missouri Statutes Annotated. If the activity of these taxicabs is subject to such control, then it will be necessary, under such statutory provisions for the operators thereof to obtain a Certificate of Convenience and Necessity.

In 1941, Section 5720 of the aforesaid Article and Chapter of the statutes was repealed and a new section enacted in lieu thereof and designated as Section 5720. Said section defines the various terms used in the aforesaid article among said terms being that of a "taxi-cab". This provision is sub-section (d) and provides the following:

(d). "The term 'taxicab' when used in this article shall mean every motor vehicle designated and/or constructed to accommodate and transport passengers, not more than five in number, exclusive of the driver, and fitted with taximeters and/or using or having some other device, method or system to indicate and determine the passenger fare charged for distance traveled, and the principal operations of which taxicabs are confined to the area within the corporate limits of cities of the state and suburban territory as herein defined."

The definition of "suburban territory" as used in the aforesaid article is, contained in sub-section (f) and is as follows:

(f). "The term 'suburban territory' when used in this article, means that territory extending one mile beyond the corporate limits of any municipality in this state and one mile additional for each 50,000 population or portion thereof: PROVIDED, that when more than one municipality is contained with (within) the limits of any such territory so described, motor carriers operating in and out of any such municipalities within said territory shall be permitted to operate anywhere within the limits of the larger territory so described."

For the purposes of this opinion it might further be well to set out sub-section (i) which prescribes the following:

(i). "The term 'irregular route' when used in this article means that portion of the public highways over which a regular route has not been established."

To furnish an answer to your question, it is necessary that we consider the statutes along with the decisions of the Courts of this State to determine whether individuals operating a "call and

demand service", such as you mention in your letter are operating motor vehicles for hire as "taxicabs", and whether they are under the control of the Public Service Commission.

The last decision touching this question is State ex rel Crown Coach Company, vs Public Service Commission, 185 SW (2) 347, and was handed down by the Kansas City Court of Appeals. In this decision, the Court went into the question of the classifications of motor carriers under Section 5720, Supra, and their exemption from the control of the Public Service Commission. In speaking of this exemption the Court said at #357:

"The exemption of "taxicabs" from the regulation and jurisdiction of the Public Service Commission under Section 5721 has other purposes than those personal to the operators of that type of service. No doubt one main purpose was to allow for the local regulation of such carriers by the municipality involved. The exemption constitutes subject matter expressly withheld from the jurisdiction of the Commission which can not by the act of the operator, or in fact by the act of the commission, be brought within the jurisdiction of the Commission in contravention of the statute, *****."

The Court in continuing it's opinion further said:

"It is evident that under Section 5720 (d) R.S. Mo. 1939, motor vehicles of the type therein described are either 'Taxicabs' or they are not 'Taxicabs', depending on the location of their principal operations. Under the evidence in this case the motor vehicles in question were common carriers for hire. See State ex rel Anderson vs Witthaus, 340 Mo. 1004, 102 SW (2) 99. To determine the jurisdiction, if any, of the Public Service Commission over such vehicles of the type described, when used for hire as common carriers as in the instant case, the statutory test is whether the 'principal operations' of the same are confined to the area within the corporate limits of cities of the state and suburban territory as described. If the facts shall show all the elements of such exemption to exist, then no part of Article 8, Chapter 35, R.S. Mo. 1939, applies to such carrier and the Public Service Commission. If the facts show any element of exemption lacking, then such vehicles are within the purview of Section 5720 (h) and 5725, which statutes and all other applicable provisions of said Article affect such vehicles, and the jurisdiction of the Public Service Commission would obtain."

Mr. G. C. Beckham

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Taking the Court's decision in the above case as a yardstick, it would appear to this department that the answer to your inquiry will be based on the facts in each case. The mere fact, that persons operate motor vehicles for hire will not necessarily subject them to the control of the Public Service Commission. Whether they come under its supervision depends on whether the "principal operations" of the particular carriers are confined to the areas within the City of Steelville or the city of Cuba or their respective suburban territories as defined in Section 5720 (e) set out above. As stated above, this can only be determined by a study of the facts in each particular case.

CONCLUSION

It is therefore the opinion of this department that persons operating a "taxicab" or motor vehicles for hire whose "principal operations" are within a city or its "suburban territory" as defined in Section 5720 (e) are exempted from the control of the Public Service Commission under Article 8, Chapter 35 of the Revised Statutes of Missouri for 1939, but if their "principal operations" are otherwise, then they are required to obtain a Certificate of Convenience and Necessity.

Respectfully submitted,

JOHN S. PHILLIPS

Assistant Attorney General

APPROVED:

J. E. TAYLOR *J.B.*

Attorney General

JSP/vb

TAXATION AND REVENUE: Funds distributed to counties by state
derived from Private Car Tax are placed
COUNTY FUNDS: in County General Revenue Fund.

November 15, 1948



Honorable Ralph R. Bloodworth
Prosecuting Attorney
Butler County
Poplar Bluff, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting
an official opinion of this department and reading as follows:

"The County Treasurer of Butler County,
Missouri received a check from the State
of Missouri in the amount of \$555.22 for
private car tax. Under House Bill 161,
Laws of Missouri, 1947 entitled Taxation
and Revenue, relating to the assessment,
levy and collection of taxes on cars or
private car line companys, there is a
provision made for the collection of these
taxes and the turning over of the tax by
the State of Missouri to the various
counties in this state. However, nothing
is said in this law regarding the county
fund in which this money should be placed.
I would appreciate the opinion of your
office on this question as the money is
being held pending receipt of your opinion."

Section 6, Laws of Missouri, 1947, Vol. I, page 544,
provides for the Comptroller to apportion to the several
counties in the state the moneys in the County Private Car
Tax Fund, such distribution to be based upon the total
mainline track mileage of such railroad or street railway
company in each county of the state. Since the Private Car
Tax law does not provide into which county fund the moneys
distributed to each county are to go, it is our opinion that
such moneys are to go into the General Revenue Fund of the
counties.

All of the special county funds, except the General
Revenue Funds of the counties, are funds which derive their
moneys from particular earmarked taxes or levies. Since the

Private Car Tax is not earmarked for any particular fund, we believe it to be clear that it can be placed only in the General Revenue Fund where it may be spent for the general county purposes authorized by law.

CONCLUSION

It is the opinion of this department that the money received by a county from the state as its share of the County Private Car Tax Fund is to be placed in the County General Revenue Fund.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:VLM

COUNTY COURTS: Refund from State to County to be credited to county fund from which warrant was issued, through error, to pay entire cost of road: Such sum can be used for road maintenance in year 1948 even though prior to the refund amount permitted by budget had been spent.

November 26th, 1948.

FILED
9

12/10/48

9

Hon. Ralph R. Bloodworth,
Prosecuting Attorney, Butler County,
Poplar Bluff, Missouri.

Dear Sir:

This will acknowledge receipt of your letter of September 27th, 1948, in which you request an opinion of this department. Your letter, omitting caption and signature, is as follows:

"The County Court has asked for an opinion from your office on the following matter: The County Court built a short farm to market road out of the 1948 road fund. Part of this road money is to be refunded to the County by the State of Missouri and will be repaid to the County next month. The County road fund is nearly exhausted and the County Court desires to know if it can spend the money paid to Butler County by the State of Missouri in maintaining the roads for the rest of the year.

It is my opinion that the County Court should be able to spend this money since the County Court advanced the money out of this years road fund knowing that a part of the road expense would be repaid by the State of Missouri. Otherwise, they might not have undertaken the expense of constructing this road. Thank you very much."

Your request calls for a construction of Sections 8619.1 to 8619.7 Missouri Revised Statutes Annotated. These provisions are quite lengthy and since some portions of them are not pertinent to the questions to be determined herein, it will not be necessary that we quote the statutes in toto. However, in order that the purpose of the Act can be understood, we set out the following which is designated as Section 8619.1 Mo. R.S.A. and which provides as follows:

"8619.1 County Aid Road Fund Created- Apportionment. There is hereby created a County Aid Road Fund to receive appropriations by the General Assembly from the Missouri Post-war Reserve Fund for the purpose of aiding and assisting the improvement, construction, reconstruction and restoration of county roads in the

manner provided in this Act. *****".

It is further provided in Section 8619.3 Mo. R.S.A. that certain roads are to be selected on which may be used the funds in question and for the purpose of this opinion we must assume that the County Court of Butler County selected the road for improvement as provided therein. In the following section of the statutes, Section 8619.4, it is provided that the Engineer or Surveyors shall prepare the plans for the contemplated road and when such plans are approved by the State Highway Commission, the State Comptroller shall then be notified and after he certifies his approval he shall set aside the necessary funds. After there has been a proper advertisement for bids on the project, as provided in Section 8619.5 Mo. R.S.A., and the work has been completed and approved by the State Highway Commission, as prescribed in Section 8619.6, the State Comptroller then certifies a warrant signed by the State Auditor, drawn on the State Treasurer and payable to the County Treasurer in the amount set aside for the project.

Your letter states that the entire cost of the road was advanced by the County Court or at least such letter indicates that to be true. This department feels that the cost of the road should have been paid at the time the State of Missouri made the refund. If this had been done, there would be no confusion at the present time. The refund could have been credited to the proper fund and then the County Court could have ordered a warrant issued from such fund for the total cost of the project. Along this line we should set out the provisions of Section 8619.6 Mo. R.S.A. which provides the following:

"8619.6 Payment For Work On County Road Projects.
Upon the completion of the project or projects for improvement, construction, reconstruction or restoration of county roads, as provided for in said contract, the State Highway Commission shall determine if such work has been performed and said project or projects completed in accordance with said plans and specifications submitted and approved. If it so finds, the said State Highway Commission shall notify the comptroller of its finding, and the comptroller shall certify a warrant, to be signed by the state auditor, drawn on the state treasurer, payable to the treasurer of said county, in the amount set aside for said project or projects, as herein provided for. Provided, however, payment on such project or projects may be made from time to time as work on the same progresses, provided, such payments shall in no event be in excess of the amount set aside for said project or projects, and provided further, that at the time of such payment the county shall make a like payment on said project or projects. The State Highway Commission and the county court of each county shall jointly determine at what time and in what amounts payments, if any, shall be made as work progresses on said project or projects included in said contract, and the State Highway Commission shall notify the comptroller

of its findings and the comptroller shall certify warrants, to be signed by the state auditor, drawn on the state treasurer, payable to the treasurer of said county, in such amounts."

Under the above provision, the State is not authorized to issue a warrant for refund to the county until the work has been completed and approved by the State Highway Commission unless the said Commission and the County Court jointly determine that payments may be made during the progress of the work. In such case, payments must be made by the State as well as the County. However, in the instant case, no such determination was made and consequently we feel that there was no reason why the County should have made the payment in question until the State had issued its refund warrant. The contractor on the project should know the law and not expect payment for his work until the project is completed.

In view of the above, it would appear that the payment of the total cost of the road which was made by the County was premature and made through error and the Court should be permitted to place the refund of \$4,000.00 back in the 1948 Road Fund from which fund the payment was made. From your letter of November 19th, 1948, it appears that the refund has been made by the State.

The next question to be considered is whether, after the refund made to the county is placed in the 1948 Butler County Road Fund, the County Court can then use such money for the purpose of maintaining the county roads for the balance of the year 1948. Your letters state that the aforesaid fund is "nearly exhausted", but when the State refund is credited thereto, then, of course, there will be a balance in such fund. For example, if the 1948 budget allowed the Butler County Road Fund to make expenditures up to \$50,000.00, and that amount had been spent, then ordinarily, under the statutes, no more expenditures could be made from such fund during 1948. However, included in the expenditures from such fund during 1948, is the amount paid through error for the road in question. Now, although the records will so indicate, has the sum of \$50,000.00 allotted to the road fund actually been spent? Would the use or spending of the additional \$4,000.00 received as a refund, be a violation of the budget limitations? Has this money which was paid out for the road actually been spent or can it be looked upon merely as an advancement by the county?

The County budget law was passed by the legislature for the purpose of providing a method by which the counties might determine the obligations to be incurred in a given year and to keep the expenditures within the anticipated income. In the case of Frank vs Buchanan County, 108 SW (2) 430, 341 Mo. 727, the Supreme Court of this state said:

"The effect and intent of the budget law, as we understand it, is to compel, or at least to make it more expedient, for the County Courts to comply with

the constitutional provision, Section 12, Article 10. Mo Constitution, which provides that a county shall not contract obligations in any one year in excess of the revenue provided for that year."

Applying the above to the instant question, if the refund from the State is placed in the 1948 County Road Fund (the fund from which the original payment was made), and the county court uses such fund for the maintenance of the county roads in Butler County, such act on the part of the court would not be a violation of the terms and intention of the budget law, since the county court will not have exceeded the anticipated revenue for the year 1948. Although any further expenditures from such fund may technically exceed the amount set by the budget, the fact is that the fund has really not been exhausted since the deposit of the refund will leave a balance unexpended in the fund which would not have been "nearly exhausted" if the payment for the project had been made at the right time.

If the county budget permits expenditures of county funds for the benefit of the roads up to \$50,000.00, then the court should be allowed to spend that sum. If the refund is credited to the 1948 Butler County Road Fund, there will be an unexpended balance of county funds credited thereto and the County Court should be authorized to use it during the year 1948.

CONCLUSION.

It is therefore the opinion of this department that the refund paid to Butler County by the State in conformity with the aforesaid provisions of the statutes should be placed to the credit of the county fund from which the payment was made for the improvement of the roads in question; it is further the opinion of this department that the County Court has the authority to spend the amount of the refund paid by the State for the maintenance of the county roads even though, prior to the deposit of the refund, the amount permitted to be spent under the budget had been exhausted.

Respectfully submitted,

John S. Phillips,
Assistant Attorney General.

Approved:

J.E. TAYLOR,
Attorney General.

OPTOMETRY BOARD: Validity of rules.

March 1, 1948

Filed: #10

Dr. J. R. Bockhorst, Secretary
Missouri State Board of Optometry
136 N. Second Street
St. Charles, Missouri



Dear Sir:

We have received your request for an opinion of this department concerning the validity of the proposed rules of the Missouri State Board of Optometry.

Section 10125, R.S. Mo. 1939, as amended Laws of 1947, page 416, contains the following provision:

"The State Board of Optometry may adopt reasonable rules and regulations within the scope and terms of this Act for the proper administration and enforcement thereof. * * *"

The Board has no inherent power to regulate the practice of optometry, and all rules and regulations adopted by it must be exercised within the frame work of the provision bestowing regulatory powers on the Board and the policy of the statute which it administers. 42 Am. Jur. 359. The rules which the Board of Optometry proposes to adopt are based upon the following provisions found in Section 10121, R.S. Mo. 1939, as amended Laws of 1947, page 415:

"The State Board of Optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes:

* * * *

"(e) Advertising by means of knowingly false or deceptive statements.

"(f) Advertising, practicing or attempting to practice under a name other than one's own.

"(g) Advertising, directly or indirectly, prices or terms for optometric services."

The United States Supreme Court, in the case of Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608-612, 55 S. Ct. 570, 79 L. Ed. 1086, made the following statement concerning regulation of advertising by persons engaged in rendering professional services connected with public health:

"We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the 'ethics' of the profession is but the consensus of expert opinion as to the necessity of such standards.

"It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement. * * *"

We shall consider each of the proposed rules separately in the light of the above principles and statutory provisions:

"1. To advertise the prices of optometric services or any supplies in the rendering of these services shall be deemed advertising optometric services under Section 10121, Paragraph G."

Section 10121 (g), quoted above, provides that advertising, directly or indirectly, prices or terms for optometric services shall be grounds for suspension or revocation of certificate of registration. In the practice of optometry the cost of supplies used in rendering optometric services is regarded as a part of the price of such services. The proposed rule is, therefore, considered reasonable and valid.

"2. That under Section 10121, subdivision (e), (f), and (g), advertising be considered to cover newspapers, magazines, radio, outside building signs, corridor signs, stair signs, door signs, window signs, letterheads, envelopes, statement heads, or any other form generally accepted as a means of advertising."

This rule is a reasonable definition of advertising, and is considered valid.

"3. That specifically under (e), and (f), above, the interpretation of this Board is that no optometrist can advertise his services directly or indirectly as connected with any other person or persons, firms companies, or corporations except a person or persons registered as an optometrist, and that any such advertising, under or connected with a name other than one's own as stated in (f), is a violation of the optometry law."

This rule is considered likely to raise the question of the right of a corporation or individual not licensed as an optometrist to employ optometrists and advertise under the corporate name or the name of the individual employer. This problem has arisen on numerous occasions in states which have adopted optometry licensing laws. The decisions under such laws are not uniform, inasmuch as they necessarily depend upon the wording of the particular statute involved. Annotations,

102 A.L.R. 343, 128 A.L.R. 585. The question has arisen previously in Missouri in the case of State ex inf. McKittrick v. Gate City Optical Company, 339 Mo. 427, 97 S.W. (2d) 89. In that case, the Missouri Supreme Court held that, under the statute as then written, a corporation was not practicing optometry in violation of the optometry law when it employed registered optometrists whom it paid specified salaries, the fees obtained by them for their services being paid directly to the corporation. In that case, the advertising was conducted in the name of the corporate employer, but the names of the licensed optometrists employed by it were included in the advertising. There has been, however, what is regarded as a recent significant amendment in the law subsequent to the above mentioned case. In the Gate City case, the court refused to oust the corporation on the grounds that it was practicing optometry without a license because the exemption statute in the optometry law, now Section 10114, R.S. Mo. 1939, contained the following exemption:

"(b) Persons, firms and corporations who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery."

However, that provision was amended in Laws of 1947, page 414, to read as follows:

"(b) Persons, firms and corporations, not engaged in the practice of optometry, who sell eye glasses or spectacles in a store, shop or other permanently established place of business on prescription from persons authorized under the laws of this state to practice either optometry or medicine and surgery." (Underscoring ours.)

The addition of the words "not engaged in the practice of optometry" is deemed significant. In the Gate City case the court was able to say that the corporation was not practicing optometry in violation of the law because of the specific exemption applicable to it. However, the exemption has now been limited to persons, firms or corporations not engaged in the practice of optometry. In the Gate City case, the court did not

hold that the corporation in question was not engaged in the practice of optometry, but that the particular method, by virtue of the exemption, of practicing optometry had not been prohibited by the Legislature. If any significance is to be attached to the recent amendment of the statute, it would seem necessarily to be to the effect that the Legislature had ruled out the method of practicing optometry approved in the Gate City case.

Therefore, we believe that the method of practicing optometry which was approved by the Supreme Court in that case has now been disapproved by this legislation, and that a corporation in this state can no longer practice optometry in such manner. As a consequence, the method of advertising, in effect, approved in that case would no longer be permissible, and the rule proposed would be valid. However, it is suggested that the rule be based on Section 10121 (g) alone, as there would appear to be no reason for including it under Section 10121(e).

"4. It shall be deemed deceptive to advertise the giving of gifts, premiums, discounts, or the like with any form of visual service."

This is a rule of long standing which is being readopted. It is considered reasonable and valid.

"5. It shall be deemed deceptive to advertise ophthalmic supplies at 'special sale' or as a 'special offer' or with any words of similar meaning."

This rule would seem to be more appropriate if placed under subsection (g) of Section 10121 rather than on the grounds of deceptive advertising, and considered under that section, the rule is deemed reasonable and valid.

"6. It shall be deemed deceptive to advertise a clinic or eye clinic in connection with the regular practice of optometry."

The reason behind this rule is that a clinic imports the idea of a place where the entire body may be studied. Any so-called eye clinic cannot be such because of the necessarily limited scope of optometric practice. In view of this, the rule is considered reasonable and valid.

"7. It shall be deemed deceptive to use in advertising, wording that is not clearly understandable or qualifying statements in smaller type which might be overlooked by a casual reader."

This rule is considered reasonable and valid.

"8. It must be presumed that any advertising in connection with the name of an optometrist must have had his sanction and approval."

This presumption cannot, of course, be an un rebuttable one. It may be overcome by direct evidence to the contrary, and the Board has no authority to provide otherwise. When so considered, the rule is deemed reasonable and valid.

The following general rules proposed to be adopted are considered reasonable and valid:

"Acting under the powers conferred upon the Board by Section 10125 of the optometry law, the Board has ruled the following to be the order of examination procedure under Section 10111.

"1. Applicants failing any subjects shall be permitted to retake those subjects at either of the two subsequent examinations. The same applicant failing any subject in the retake examination, may make a new application for complete examination in not less than one year from the date of the last examination.

"The Missouri State Board of Optometry adopts the following procedural rules as a guide to licensed Missouri optometrists.

"1. Report violations of the optometry law and board rules and regulations to the Secretary of the board.

"2. An optometrist registered in the State of Missouri must notify the Secretary of the Board of any change of office address.

Dr. J. R. Bockhorst

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"3. Any board ruling found to be invalid,
shall not effect the validity of any other
board ruling."

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:LR

SHERIFFS: Amount paid janitor for going after food at restaurant for persons confined in county jail and returning tray and dishes constitutes actual costs, as provided in Section 4, page 1563, Laws of Missouri 1945.

March 15, 1948

FILED

10

3/16

Honorable Fred C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"A situation has arisen regarding the payment of certain bills by the County Court to our Sheriff. Under the provisions of House Bill No. 899, Section 4, said Sheriff is to be reimbursed for the actual expense to him of feeding prisoners. We do not have any combination jail and residence in our County. The jail is located in the basement of the Court House, there being no residence. The Sheriff makes his home a distance from the County seat. The Sheriff made arrangements with a local restaurant to furnish food to the prisoners. The janitor of the Court House, at the request of the Sheriff, brought the meals from the restaurant to the jail and returned the untinsels to the restaurant. The Sheriff has presented to the Court a bill of .50¢ per day for sums paid to the janitor for such services. Is the amount for these services to be treated as a part of the 'cost of feeding prisoners' within the meaning of the law. The County Court wishes to pay this bill if it is proper under the statute, but desires your opinion as to the propriety of making such payment. Please advise."

Section 4, page 1563, Laws of Missouri 1945, requires a sheriff to furnish wholesome food to all persons in his care and custody that may be lodged in the county jail, and further

provides that the sheriff at the end of each month shall submit to the county court a statement of actual cost incurred by him in the feeding of persons under his custody. Section 4 reads:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

The foregoing law is somewhat flexible in that it does not name any specific amount of money that the sheriff may expend for such food. We think this is probably true, for the reason the same facilities are not afforded the sheriffs in all counties for feeding persons incarcerated in county jails. For instance, it might cost more for some sheriffs to adequately feed persons than other sheriffs, for the reason that in some counties the sheriff's residence joins the county jail and in other cases they are under the same roof. Such sheriffs could probably save the county on costs of feeding such persons. However, in this instance, we understand the sheriff resides at a considerable distance from the jail, as there is no other adequate and available living quarters for him.

The primary rule of statutory construction is to ascertain from language used the legislative intent, if possible, and give

it that effect. See *Donnelly Garment Co. v. Keitel*, 193 S.W. (2d) 577, 354 Mo. 1138. Under Section 4, *supra*, the sheriff is entitled to be reimbursed for the actual cost incurred by him in feeding of persons under his custody. It can readily be seen that this does not restrict him to the actual costs of the food. "Actual cost" has been defined by the courts under numerous conditions and circumstances. The court, in *Boston Molasses Co. v. Molasses Distributors' Corporation*, 175 N.E. 150, 1.c. 152, 274 Mass. 589, held that the term "cost," or "actual cost," does not at all times have the same meaning and varies according to the circumstances in which it is used. In so doing, the court said:

"The construction of the lease depends upon the intention of the parties to be ascertained by considering all its terms, giving to the words used the natural and reasonable meaning in the light of the facts to which they apply and the circumstances in which they are used. *Grennan v. Murray-Miller Co.*, 244 Mass. 336, 138 N.E. 591; *Clark v. State Street Trust Co. (Mass.)* 169 N.E. 897; *Lovell v. Commonwealth Thread Co., Inc. (Mass.)* 172 N.E. 77. Some liberality of construction in favor of a lessee has been suggested in case the terms of a lease are of uncertain or doubtful meaning. *Carpenter v. Pocasset Manuf. Co.*, 180 Mass. 130, 133, 61 N.E. 816; *Watts v. Bruce*, 245 Mass. 531, 534, 139 N.E. 650. The term 'cost' or 'actual cost' is not a technical one having at all times the same meaning. It is a general or descriptive term which may have varying meanings according to the circumstances in which it is used. In *Fillmore v. Johnson*, 221 Mass. 406, 412, 109 N.E. 153, the court held that upon the facts the actual cost of finishing paper should include such fixed charges as heat, light, rent, office expenses, superintendence, repairs, depreciation and other incidentals. See *Municipality of Bulawayo v. Bulawayo Waterworks Co., Ltd.*, (1908) A. C. 241, 247.

"Under the terms of the lease the arbitrators had a right to take into consideration in determining the cost of steam the overhead expenses enumerated in their report. The exclusion of 'executive overhead to the Lessor' from the 'actual cost' in defining the limit which the rates by the arbitrators could not exceed by implication suggests that the parties contemplated that other overhead expenses might be included. The case of *Stanwood v. Comer*, 118 Mass. 54, is not controlling authority to the contrary. The lease there contained no such provision as to executive overhead. It was a lease of part of a building. The owner bound himself to put in 'proper apparatus' to heat the building by steam. The clause in the lease concerning which the controversy arose was the lessee's agreement 'to pay the proportionate part of the expenses of heating' the building by steam. The court interpreted the covenant to mean that the lessee would contribute his proportion of the actual outlay or expenditure incurred in the current, ordinary and regular supply and management of the apparatus for the general benefit of the tenants, and held that the tenant was not liable for the interest on the cost of the heating apparatus and its appliances, the expense of keeping them in repair and their depreciation in value. The terms of the lease in the case at bar, the subject matter to which they apply and the circumstances known to the parties when the lease was executed distinguished this case from that last cited."

In *State v. Northwest Poultry & Egg Co.*, 281 N.W. 753, 1.c. 755, the court held that "actual cost" imports the exact sum expended rather than a part of the cost. In so holding, the court said:

"'Actual cost' has no common-law significance, and it is without any well understood trade or technical meaning. 'It is

a general or descriptive term which may have varying meanings according to the circumstances in which it is used.' Boston Molasses Co. v. Molasses Distributors' Corp., 274 Mass. 589, 594, 175 N.E. 150, 152. It imports the exact sum expended or loss sustained rather than the average or proportional part of the cost. Lexington & West Cambridge R. Co. v. Fitchburg R. Co., 75 Mass. 226, 9 Gray 226. Its meaning may be restricted to overhead or extended to other items. 1 C.J.S. Actual, 1440. It has been used to include overhead, rent, depreciation, taxes, insurance, etc. Bulawayo Municipality v. Bulawayo Waterworks Co. Ltd., (1908) A.C. 241; Boston Molasses Co. v. Molasses Distributors' Corp., supra. Whether actual cost in this case is limited to gasoline, or whether it extends to depreciation, license fees, insurance, repairs, the wages of the driver, or the actual worth of the services of an operator if driven by the owner is not stated. * * *"

In view of the foregoing definitions of the term "actual cost" and taking into consideration the language used in the statute to be construed, especially that part which requires a sheriff to make a statement of actual cost incurred by him in the feeding of persons in his custody, we are of the opinion that such language should be construed to include the fifty cents per day paid to the janitor, or anyone else, for going to the restaurant for the food for the persons confined in the county jail and returning the dishes and tray to the restaurant. Under the circumstances, if the sheriff should be required to do this, it would require too much of his time from his duties, and, in the final analysis, it would cost the county or state, as the case may be, much more than fifty cents per day allowed for such services.

CONCLUSION

Therefore, it is the opinion of this department that the fifty cents per day paid the janitor, or anyone else, for going

Hon. Fred C. Bollow

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after the food to be served to persons in the county jail and under the care and custody of the sheriff, and returning the dishes and tray to the restaurant, should be considered as a part of actual costs incurred in the feeding of such persons, as provided in Section 4, page 1563, Laws of Missouri 1945.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JEB*
Attorney General

ARR:LR

OPTOMETRY:

Advertisement "prices are reasonable" not indirect advertisement of prices for optometric services within Section 10121 (G) R. S. Mo. 1939, as amended (Laws, 1947, p. 415).

June 29, 1948



Dr. J. R. Bockhorst, Secretary
Missouri State Board of Optometry
136 N. Second Street
St. Charles, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Missouri State Board of Optometry has received a complaint regarding one of its optometrists who advertises 'Her prices are reasonable'.

"It is our believe that this constitutes a violation of the Optometry Law, Section 10121, Paragraph G. The basic problem that we have to consider is whether or not this quotation constitutes indirect advertising for optometric services, therefore I respectfully request an interpretation of this matter from your office."

Section 10121, R. S. Mo. 1939, as amended (Laws, 1947, p. 414, 415), contains the following provision:

"The State Board of Optometry may either refuse to issue or may refuse to renew, or may suspend or may revoke any certificate of registration for any one or any combination of the following causes: * * (g) Advertising directly or indirectly prices or terms for optometric services".

This provision has not received any judicial construction. Its application to the advertising to which you refer must be determined by the applicable rules of statutory construction. Statutes such as this, providing for the revocation of license to engage in a profession or business, are generally regarded as penal in

Dr. J. R. Bockhorst

nature, requiring that they be strictly construed in favor of the licensee. (State ex rel. Spriggs v. Robinson, 253 Mo. 271, 161 S.W. 1169; State ex rel. Wolfe v. Missouri Dental Board, 282 Mo. 292, 221 S.W. (2d) 70). The provision must also be so construed as to give effect to the intention of the Legislature. Applying those principles to the section in question, we find that the Legislature has not prohibited entirely advertising by licensed optometrists. The advertising, in order to be objectionable, must be of a nature expressly prohibited by the statute. If the advertising in question is to be considered ground for disciplinary action by the Board of Optometry, it must be because it constitutes indirect advertising of prices for optometric services, since the Legislature must have intended direct advertising of prices to make specific reference to the prices charged.

In the case of Rust v. Missouri Dental Board, 348 Mo. 616, 155 S.W. (2d) 80, l.c. 83, the meaning of the word "indirect" as used in the expression 'advertising directly or indirectly' has its usual and in fact primary meaning, not directly; obliquely; in a round about manner; dishonestly."

We believe that a statement in an advertisement that "prices are reasonable" is not indirectly advertising prices within such meaning of the term "indirectly". Considering the fact that the Legislature has not entirely prohibited advertising, and taking into consideration the rule of strict construction, we believe that the Legislature must have intended to include in the prohibition of indirect advertising of prices, advertising designed to evade the prohibition against direct advertising of prices, or advertising from which prices could be deduced without mentioning exact figures. The advertising in question is not considered to fall within such category, and is believed not to be the type of advertising at which the statute was aimed.

CONCLUSION

Therefore, we are of the opinion that an advertisement by an optometrist which contains the words "Her prices are reasonable" is not an advertisement, direct or indirect, of prices or terms for optometric services within the meaning of Sec. 10121 (g) R. S. Mo. 1939, as amended (Laws, 1947, p. 415).

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

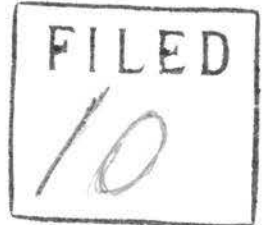
SCHOOL BOARDS: Member cannot contract in private capacity with board.

(September 1964 -- See statute 165.157, RSMo 1963
Supp. making, selling or providing commodities a
misdemeanor.)

June 30, 1948

Honorable Fred C. Bollow
Prosecuting Attorney
Shelby County
Shelbina, Missouri

FILED 10



Dear Mr. Bollow:

This is in reply to your letter of recent date requesting
the opinion of this department, and reading, in part, as follows:

"I have some citizens in the County who earnestly insist that the members of a school board have no right or authority under the law to sell any supplies of any kind or character to the school. The town has a population of less than 25,000, in fact, less than 2,000 and they have purchased considerable material for redecorating the school; in fact, they have purchased considerable thereof from one of the members of the Board of Directors. I can find no authority under which said purchase could be held to be illegal, unless it be Section 10501, Laws 1945, Page 1649, Section 1. Said Section prohibits any member of the Board from 'Holding any office or employment of profit from said Board while a member thereof.' Could it possibly be said that the term employment for profit could be construed to mean that the board member had no right to sell such supplies to the board. * * *

The question presented is whether or not a member of the public school board of a city having less than 25,000 inhabitants can contract with such school board for the sale of materials for the redecoration of a school building within such district.

Section 10501, Mo. R.S.A. (Laws of 1945, page 1649), provides, in part, as follows:

"No member of any public school board of a city, town or village in this state having less than twenty-five thousand inhabitants shall hold any office or employment of profit from said board while a member thereof except the secretary and treasurer, who may receive reasonable compensation for their services:
* * *

Aside from a consideration of the above statute in regard to this question, it is necessary that we look to the public policy of the state in accordance with which our actions must be motivated. A school district is a public corporation, and a member of the school board of such a school district occupies a fiduciary relationship to the district. State v. Nolte, 169 S.W. (2d) 50, 1.c. 55. In that connection we cite the case of State of Missouri, at the relation of James E. Smith, v. Thomas K. Bowman, 184 Mo. App. 549, wherein the following appears at pages 557, 558:

" * * * In Woods v. Potter, (Cal.) 95 Pac. 1125, 1127, the court said: 'Members of city councils occupy a position of trust, and are bound to the same measure of good faith towards their constituents that a trustee is to his cestui que trust. (Andrews v. Pratt, 44 Cal. 309.) The mere fact that a member of such a body acts as such in connection with any matter in which he is interested vitiates the transaction. (Finch v. Riverside, 87 Cal. 597, 25 Pac. 765.) It will be presumed that under such circumstances self-interest prevents the individual member from protecting the rights of the public against his own.'

"A great statesman has voiced the basic principles governing official conduct by declaring that: 'A public office is a public trust.' Like a trustee, such officer must not use the funds or powers entrusted to his care for his own private gain or advancement. To allow him to do otherwise is against public policy. It is

of the utmost importance that every one accepting a public office should devote his time and ability to the discharge of the duties pertaining thereto without expectation of personal reward or profit other than the salary fixed at the time of accepting the same; and that he should do so, except for a most weighty reason, to the end of his term. Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, or to have their salaries increased or decreased, or to accept offices created by themselves."

Another similar situation was ruled on by the Supreme Court in *Witmer v. Nichols*, 8 S.W. (2d) 63, where the following statement is found at page 65:

"On the face of the allegations the conclusion could well be drawn that Nichols, knowing that the school board was desirous of securing a high school site on Armour's land near the southwest corner of Sixty-Fifth Street and Wornall Road and that it was unable to do so, bought the entire tract for himself, and then sold the district a site, thereby obtaining the personal benefits and advantages pointed out in the petition. Notwithstanding, the petition seems to have been drawn on the theory that Armour sold the district the school site, but that the sale and conveyance of the site was part and parcel of a scheme engineered by Nichols whereby the latter not only succeeded in boosting the value of the land he already owned but was enabled to acquire another tract on more advantageous terms than he could otherwise have obtained. This view was adopted by the pleader, no doubt, in order to avoid the effect of the decision in *Bedell v. Nichols* (Mo. Sup.) 292 S. W. 21, where the

facts were in evidence and where, on the facts, it was held that Nichols was not a party to the contract of sale. But on either theory of fact the transactions, in so far as the school district was involved, contravened public policy. Nichols as a member of the board of directors owed the school district an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

The above rule in the Witmer case is referred to with approval in the recent Springfield Court of Appeals case of Smith v. Hendricks, 136 S.W. (2d) 449, l.c. 457.

It is well settled that the public policy of Missouri is declared in the decisions of the Supreme Court. In the case of Griffith v. Mutual Protective League, 205 S.W. 286, it was said at page 291:

" * * * The public policy of a state is to be found as expressed in its Constitution and laws, and in the decisions of its highest court, and not from general considerations of the supposed public interests and policy of the state beyond what such sources of information make known to the court. Vidal v. Girard, 2 How. 127, 11 L. Ed. 205; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co., 175 U.S. 91, loc. cit. 100, 20 Sup. Ct. 33, 44 L. Ed. 84, and cases there cited. * * *"

The policy of the state, with regard to the contracting with an official board by a member of that board, is very definitely expressed by the Supreme Court of Missouri in the case of Nodaway County v. Kidder, 129 S.W. (2d) 857, where that court said at page 861:

"Appellant's alleged contract was also void as against public policy regardless of the statute. A member of an official board cannot contract with the body of which he is a

member. The election by a Board of Commissioners of one of its own members to the office of clerk and agreement to pay him a salary was held void as against public policy. Town of Carolina Beach v. Mintz, 212 N.C. 578, 194 S.E. 309; 46 C.J. 1037 Sec. 308."

It is clear then that the trend and policy of our law is to remove from public officials all temptations to use their official power, directly or indirectly, for their own private gain or advancement.

Conclusion.

In view of the foregoing authorities, it is the opinion of this department that a member of the public school board of a city having less than 25,000 inhabitants cannot legally contract with such school board for the sale of materials for the redecoration or improvement of a school building within the jurisdiction of such public school board.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ml

COUNTY CLERKS: The clerk of the county court in counties of the third class are authorized to select clerical help.

September 10, 1948

FILED

10

9-14

Honorable Fred C. Bellow
Prosecuting Attorney
Shelby County
Shelbina, Missouri

Dear Sir:

Reference is made to your request for an official opinion on the following matter:

"The situation is namely this: The County Court included in its budget a sum of money for extra clerical hire in the County Clerk's office for the purpose of making up the tax books. This is, of course, customary. The County Clerk takes the position that she is the one to pick such extra clerical hire. The Presiding Judge of the County takes the position that she needs the extra clerical hire but cannot have such unless he picks the same.* * "

We note that in accord with the scheme of classification of counties adopted by the General Assembly of Missouri, Shelby County has been assigned to the third class. In the premises, Section 13441.16, Mo. R.S.A., is germane to the subject matter of your inquiry. This section reads in part as follows:

"The clerk of the county court in each county of the third class shall be entitled to employ deputies and assistants, and for such deputies and assistants shall be allowed the following sums: * * * * *
The county court in all counties of the third class may allow the county clerk, in addition to the amount herein specified for deputies' or assistants' hire, a further sum not to exceed \$500 per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by

the county court of such county; provided that the county court shall determine that the work required to be done by such clerk or clerks demands or requires such extra remuneration."

You will note that under the quoted statute, the additional amount of not to exceed five hundred dollars, provided by the county court, is in the form of reimbursement to the county clerk. The reimbursement is to cover the added expense incident to such clerk being required to provide either extra clerical help in the office or to pay additional compensation to a regular deputy or assistant. Such reimbursement is conditioned upon an actual expenditure by the county clerk of such money and upon a determination being made by the county court that the work of the office demands or requires such extra help or added remuneration. Nowhere in the statute does there appear any specific authorization to the county court to select such extra clerical help or to determine which regular deputy or assistant is entitled to extra remuneration. On the contrary, since the amount represents a reimbursement to the county clerk, it seems only logical that such officer is the one having the power to determine who should be employed as an extra clerk or to which deputy or assistant the extra remuneration should be paid. This is further born out by the quoted sentence in the statute authorizing the county clerk to employ deputies and assistants.

CONCLUSION

In the premises, we are of the opinion that the clerk of the county court in counties of the third class has the right to designate such extra clerical help as may be necessary, or to designate such regular deputy or assistant as is entitled to the extra remuneration under the provisions of Section 13441.16, Mo. R.S.A., all conditioned, however, upon funds for the reimbursement of such county clerk, having been provided by the county court, and further conditioned upon the determination by the county court that the work required to be done by such clerk demands or requires the employment of such additional clerical help or the payment of extra remuneration to a regular deputy or assistant.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General *TS*

WILL F. BERRY, JR.
Assistant Attorney General

ELECTIONS: The term "General Election" means the election held in November of even years.

HOSPITAL: Trustees not nominated by primary elections: any qualified person may be placed on ballot.

January 31, 1948

FILED

peg
Mr. Llyn Bradford
Prosecuting Attorney
Phelps County
Rolla, Missouri

9/3
Dear Mr. Bradford:

Your letter of January 15, 1948, requesting an opinion of this Department has been received. Omitting caption and signatures, your inquiry is as follows:

"The county clerk of Phelps County, who has certain duties with reference to preparing the ballots for county elections, has requested that I obtain from you an official opinion as to Sec. 15193, Laws of Missouri, 1945, pages 984 and 985, concerning county hospital trustees.

The people of Phelps County at the last general election in 1946, voted \$400,000 in bonds for the construction of a county hospital. The county court appointed five trustees in accordance with Sec. 15193. This statute provides that such trustees shall hold their offices until "the next following general election".

The first question that the county clerk wanted answered was whether this means the general county primary election on the first Tuesday in August or the regular general election on the first Tuesday in November. If the provision means that the trustees are elected at the November general election, then the next question is how are candidates for the position of hospital trustees nominated and how do they get on the general election ballot? If they are not nominated in the primary election, is it necessary that a petition be filed with the required signatures in order to get them on the general election ballot?

It is clear that under the provisions of this statute that at each subsequent general election after the first one, the trustees are selected as any other county officers by nomination and election, but this statute does not seem to make it clear as to how this matter is handled in the first election when these trustees are elected for different terms."

The Statutory provisions referring to the matters contained in your request are Sections 15193 and 15193a of the Missouri Statutes annotated. These provisions are as follows:

"15193. Board of Trustees -- pecuniary interest in purchase of supplies prohibited.

The county court shall appoint five (5) trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three (3) of said trustees to be residents of the city, town or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital. The said trustees shall hold their offices until the next following general election, when five (5) hospital trustees shall be elected and hold their offices, three (3) for two (2) years and two (2) for four (4) years, and who shall by lot determine their respective terms. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of hospital trustees who shall each serve for a term of four (4) years. Any vacancy in the board of trustees occasioned by removal, resignation or otherwise shall be reported to the county court and be filled in like manner as original appointments, the appointee to hold office until the next following general election, when such vacancy shall be filled by election of a trustee to serve during the remainder of the term of his predecessor. No trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for said hospital, unless the same are purchased by competitive bidding."

"15193a. Announcement of candidacy for trustee -- ballots-election.

(1) Each candidate for the office of hospital trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election. Such announcement shall indicate whether the individual is a candidate for a full or an unexpired term of a named predecessor. No filing fee shall be required to be paid upon the filing of any such announcement. If announcements of a sufficient number of trustees are not filed, the county court shall appoint such trustees as may be necessary to fill all vacancies on the board which result from the expiration of the term of any trustees and any such appointee shall serve until the next general election when a trustee shall be elected to fill the remainder of the unexpired term.

(2) The county court shall prepare a separate ballot containing the names of all candidates who have announced for trustee as aforesaid which shall not contain any designation of the political party affiliation of any candidate for trustee. Such ballots shall designate the number of trustees to be elected and shall state whether any of such trustees is to be elected for an unexpired term, and shall be in form substantially as follows: * * * * *

Your request contains more than one question and such questions will be considered in the order set out in your letter. Question number 1 is whether the reference to "general election" in section 15193, supra, refers to the County primary election on the first Tuesday in August or the general election held on the first Tuesday in November. It will be noted that the following phrase is used: "The said trustees shall hold their offices until the next following general election * * *." (underlining ours). In Article 8, Section 1 of the Constitution of Missouri for 1945, the time is set for the general election. This provision provides as follows:

"Section 1 -- The general election shall be held on the Tuesday next following the first Monday in November of each even year, unless a different day is set by law, two-thirds of each house assenting."

Section 655, Missouri Statutes annotated page 4899, provides as follows:

"Section 655. The construction of all statutes of this state shall be by the following additional rules unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain and ordinary or usual sense * * * * *. Sixteenth, the term 'general election' refers to the election required to be held on the Tuesday succeeding the first Monday of November, biennially; * * * * *."

From the above constitutional and statutory provisions, we feel that the term "general election," as set out in Section 15193, means the next general election to be held in November of an even year. In construing the language of the Constitution and of statutes, the words used, unless they are technical, are to be understood in their usual and ordinary sense. See State ex rel. Barrett vs. Hutchback, 146 S.W. 40, 241 Mo. 433.

The next question to be considered is the manner in which candidates for the position of hospital trustee are nominated and by what means their names are placed upon the ballot for the general election ballot. Attention should first be directed to the first sentence in Section 15193a, Missouri Statutes annotated, set out above. This sentence reads as follows:

"Each candidate for the office of hospital trustee shall file with the county clerk an announcement of candidacy in writing not later than thirty days before the general election."

Again applying the rules of construction, supra, we construe this sentence to mean that in order for a person to become a candidate as hospital trustee, he must file a declaration of candidacy with the county clerk 30 days before the general election. It will be noted that the statute does not provide that the declaration shall be filed 30 days before the last filing date for the primary election, but only 30 days before the general election. This indicates that prospective candidates for such position are not required to enter a primary and be nominated by any particular political party or group, but only must be able to meet the qualifications of a hospital trustee. At the general election, all persons filing as candidates for trustees are then voted upon and the five receiving the highest number of votes are considered elected, there being five positions to be filled. Section 15193a, supra, further provides that should there not be enough persons filing as candidates to fill the five positions, that after the election, the County Court may then fill the vacancy by appointment, said appointee to act as hospital trustee until the next general election.

The above, we feel, also answers your third question, ie, whether the candidates are required to present a petition with a certain number of names as a prerequisite to having their names placed on the ballot should they not be nominated in the primary election. Obviously, there need not be a petition with signatures nor need there be a nomination by a political party or group.

CONCLUSION

Therefore, it is the opinion of this Department that the term, "general election" referred to in Section 15193, means the general election held in November of the even years as provided by Article 8, Section 1 of the Constitution of Missouri. It is further the opinion of this Department that candidates for the position of hospital trustee provided for in Sections 15193 and 15193a, of the Missouri Statutes annotated are not nominated in a primary election, but any qualified person may declare himself a candidate for such position. This Department

Mr. Llyn Bradford

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further feels that it is not necessary that a petition with the required number of signatures be presented in order that a trustee be nominated and their name placed on the general election ballot as provided for by Sections 15193 and 15193a of Missouri Statutes Annotated.

Respectfully submitted,

JOHN S. PHILLIPS

ASSISTANT ATTORNEY GENERAL,

APPROVED:

J. E. TAYLOR *JTB*

ATTORNEY GENERAL.

MAGISTRATE COURTS: Warrant issued by magistrate and endorsed
CRIMINAL PROCEDURE: by county clerk may be served by sheriff
of another county if endorsed by a magis-
trate of such county.

FILED

June 8, 1948

6-8
Honorable F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

This is in reply to your letter of recent date requesting
an opinion from this department, which reads, in part, as
follows:

"I would like to know just what it is
necessary to do with reference to a
State Warrant issued by a Magistrate
Court in County of the Third Class so
that such Warrant may be sent to the
Sheriff of another County and served
by him."

It is provided by section 3859, R. S. Mo. 1939, that war-
rants issued by a magistrate, other than a judge of the supreme
court or circuit or criminal court of any county, may be executed
in any part of the county within which he is such officer, and
not elsewhere, unless endorsed in accordance with Section 3860.
Said Section 3860 is as follows:

"If the person against whom any warrant
granted by a judge of the county court,
justice of the peace, mayor or chief
officer of a city or town shall be issued,
escape or be in any other county, it shall
be the duty of any magistrate authorized
to issue a warrant in the county in which
such offender may be or is suspected to
be, on proof of the handwriting of the
magistrate issuing the warrant to indorse
his name thereon, and thereupon the of-
fender may be arrested in such county by
the officer bringing such warrant, or any

officer within the county within which the warrant is so indorsed; and any such warrant may be executed in any county within this state by the officer to whom it is directed, if the clerk of the county court of the county in which the warrant was issued shall indorse upon or annex to the warrant his certificate, with the seal of said court affixed thereto, that the officer who issued such warrant was at the time an acting officer fully authorized to issue the same, and that his signature thereto is genuine."

The term "justice of the peace" as used in the above statute includes and refers to "magistrate" (Laws of Missouri, 1945, page 1079). It follows then that a warrant granted by a judge of the magistrate court against a person who has escaped or is in another county must be endorsed or certified to by the clerk of the county court, to the effect that such judge of the magistrate court was at the time of issuing said warrant an acting officer fully authorized to issue the same and that his signature thereto is genuine; and, further, must be endorsed by a magistrate in the county in which such offender is or may be suspected to be in order to authorize the sheriff of such county to serve the same.


Conclusion.

It is therefore the opinion of this department that a warrant issued by a judge of the magistrate court in one county which is endorsed or certified to by the clerk of the county court may be served by the sheriff of another county upon endorsement by a magistrate authorized to issue such warrants in such county.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR 
Attorney General

DD:ml

ELECTIONS: All identifying numbers on ballot must be concealed by black sticker.



October 25, 1948

10-26

Mr. George F. Breitenstein, Chairman
Democratic County Committee
St. Louis County
Clayton 5, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Section 11607, Laws of Missouri 1941,
page 363, provides in part as follows:

"Every ballot shall be numbered in numerical order in which received, and it shall be the duty of the election judges, in the presence of the voter, before any ballot is placed in the ballot box, to cover or conceal securely the identifying number or numbers placed on the ballot by placing over the number or numbers, and pasting down, a black sticker, which sticker is to be two inches square with gummed edges extending three-eighths (3/8) of an inch towards the center of the square, so as to conceal but not destroy, the number or numbers placed thereon.
* * *

"Does said section refer to all numbers which may be placed upon the ballot which would enable any person to identify the person casting the ballot, or does the section apply only to the number placed on the ballot which indicates the numerical order in which it is received?"

As stated in your request, Section 11607, Laws of Missouri 1941, page 363, provides that a black sticker must be placed over the "identifying number or numbers" so as to conceal but

Mr. George F. Breitenstein

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not destroy "the number or numbers placed thereon." As our Supreme Court has aptly said in Bradley v. Cox, 197 S.W. 88, "The real requisites are that the ballot shall preserve secrecy and show the voter's choice."

Section 11607, supra, is plain in its requirement that all identifying numbers shall be covered with a black sticker. To conceal one of the identifying numbers only, and to leave exposed other numbers by which the identity of the voter could be ascertained, would nullify the purpose of the law and would destroy the secrecy of the ballot. We believe the statute is plain in its requirement that all identifying numbers upon the ballot should be concealed by a black sticker.

CONCLUSION

It is, therefore, the opinion of this department that, under the provisions of Section 11607, Laws of Missouri 1941, page 363, all identifying numbers upon a ballot must be concealed by placing a black sticker over the numbers so as to conceal but not destroy the same.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:LR

COUNTY HOSPITALS: Restriction on number of trustees who may reside in town where hospital is located does not apply to trustees chosen at election.

November 22, 1948



11-23

Honorable Llyn Bradford
Prosecuting Attorney, Phelps County
Rolla, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Certain questions have arisen in this county concerning which I desire an official opinion from your department relative to House Bill #24, Laws of Missouri, 1947, pages 323-325, pertaining to county hospitals. Phelps County voted in the general election of 1946 for a bonded indebtedness in the sum of \$400,000.00 to construct and equip a county hospital. The county court in accordance with Section 15193A selected a board of trustees of five members. This section provides no more than three of such trustees shall be from the incorporate city in which the hospital is located. In accordance with Section 15193A a number of candidates ran for the position of trustee, there being seventeen candidates, and of the five highest at the general election, 1948, four were from Rolla in the corporate limits of which the hospital is located. Section 15193" makes no provision with regard to the number that can be elected on this board from the incorporate city in which the hospital is located.

"The question now is whether the four highest being from Rolla can qualify for this position or whether the three highest from Rolla can qualify and the two highest outside of Rolla shall hold the two other positions on the board.

"The county clerk also requested that I ask for an opinion as to when these trustees are qualified and shall enter into the performance of their duties as members of the board of trustees. Section 16193A provides that the five who receive the highest number of votes for the office of trustee shall be declared

elected by the county court which shall issue commissions to the elected trustees. Ordinarily the new officers in the county take their respective offices the first of January. We desire to know whether the new trustees can qualify, receive their commissions and take their positions on the board of trustees at that time."

Section 15193, Mo. R. S. A. (Laws of 1947, Vol. I, p. 323) provides, in part, as follows:

"The county court shall appoint five (5) trustees chosen from the citizens at large with reference to their fitness for such office, all residents of the county, not more than three (3) of said trustees to be residents of the City, town or village in which said hospital is to be located, who shall constitute a board of trustees for said public hospital. The said trustees shall hold their offices until the next following general election, when five (5) hospital trustees shall be elected and hold their offices, three (3) for two (2) years and two (2) for four (4) years, and who shall by lot determine their respective terms. At each subsequent general election the offices of the trustees whose terms of office are about to expire shall be filled by the election of hospital trustees who shall each serve for a term of four (4) years.* * * *"

Section 15193a Mo. R.S.A. (Laws of 1947, Vol. I, p. 324) provides the method of electing trustees. Candidates are required to file announcements of candidacy with the county clerk not later than thirty days before the general election. The county court is required to prepare a separate ballot, containing the names of the candidates and stating the number of candidates to be elected. The election officials are required to make return of the vote for trustees to the county court in the same manner as required for return of the vote for candidates for other offices. "The candidates whose names have been placed on the ballot by the county court pursuant to this act and who receive the highest number of votes for the offices of trustee to be filled shall be declared elected by the county court which shall issue commissions to the elected trustees."

As you have pointed out in your letter, section 15193 provides that of the five trustees originally appointed by the county court, not more than three shall be residents of the city, town or village in which the hospital is to be located. However,

nowhere is it provided that, of the persons selected at the next general election as trustees, not more than three may be residents of the city in which the hospital is located. We feel that, in view of the failure of the legislature to make such provisions as to the elected trustees, they must have intended that limitation to apply only to the original board, appointed by the county court. No provision is made in the statute for indicating on the ballots the place of residence of the candidates. Seemingly, had the Legislature intended the limitation to apply to elected trustees, some such provision would have been made in order to enable the voters to avoid voting for persons who might in any event be ineligible because of their residence.

"Statutes imposing qualifications should receive a liberal construction in favor of the right of the people to exercise freedom of choice in the selection of officers. Furthermore, disqualifications provided by the Legislature are construed strictly and will not be extended to cases not clearly within their scope * * *." 46 C.J. Officers, Sec. 32, p. 937. Applying those rules to the present situation, we feel that the five persons who have received the largest number of votes should be declared elected, without regard to their residence.

As to the time when the trustees take office, Section 15194 Mo. R.S.A. (Laws of 1945, p. 985) provides in part: "The trustees shall, within ten days after their appointment or election, qualify by taking the oath of civil officers and organize as a board of hospital trustees * * *." As pointed out above, Section 15193a Mo. R.S.A. (Laws of 1947, Vol. I, p. 324) requires the election official to make return of the vote for trustees to the county court in the same manner as required for return of the vote for candidates for other offices. Section 11615 Mo. R.S.A. provides that the county clerk shall examine and cast up the votes within five days after the close of each election and give to the persons having the highest number of votes certificates of election. In view of the provisions of Section 15194, Mo. R.S.A., the trustees would take office within ten days after the county clerk had cast up the votes and declared the names of the persons who had been elected.

CONCLUSION

Therefore, it is the opinion of this department that the five persons receiving the largest number of votes at the general election as candidates for county hospital trustees under Section 15193, Mo. R.S.A. (Laws of 1947, Vol. I, p. 323) should be declared elected as trustees, without reference to their residence, the

Hon. Llyn Bradford

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limitation that only three of the trustees may be residents of the city in which the hospital is located applying only to the original board of trustees selected by the county court. The trustees chosen at the election should take office within ten days after the county clerk has cast up the votes cast at the election and declared the five persons having the largest number of votes elected.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

RRW:mw

APPROVED:

J. E. TAYLOR
Attorney General

J. E.

Feb 24
Burlington

TAXATION: Authority to issue bonds for construction of school-
SCHOOLS: house carries with it the authority of directors to
impose a tax for sinking fund and interest in addition to the rate for current purposes.

February 20, 1948

FILED

12

Honorable Joseph N. Brown
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

2/25

Dear Sir:

This is in reply to your letter of recent date, wherein you state that an election has been held in a common school district and authority granted to the directors to issue and sell bonds for the erection of a school building, and request an opinion on the authority of the directors to increase the rate of taxation so as to provide a sinking fund and interest to retire the bonds and pay the interest thereon as same falls due. You also state that it is claimed by some that the rate of taxes, including the sinking fund and interest rate, may not be above 65¢ on the hundred dollars assessed valuation without approval of voters.

The authority for levying and collecting taxes for school district purposes must be derived from the Constitution and statutes. We will first refer to the constitutional provisions applicable here. Section 11(a) of Article X of the Constitution of Missouri, 1945, provides as follows:

"Taxes may be levied by counties and other political subdivisions on all property subject to their taxing power, but the assessed valuation therefor in such other political subdivisions shall not exceed the assessed valuation of the same property for state and county purposes."

Section 11(b) of Article X of the Constitution of Missouri, 1945, provides as follows:

"Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:

"For municipalities--one dollar on the hundred dollars assessed valuation;

"For counties--thirty-five cents on the hundred dollars assessed valuation in

counties having three hundred million dollars, or more, assessed valuation, and fifty cents on the hundred dollars assessed valuation in all other counties;

"For school districts formed of cities and towns--one dollar on the hundred dollars assessed valuation, except that in the City of St. Louis the annual rate shall not exceed eighty-nine cents on the hundred dollars assessed valuation;

"For all other school districts--sixty-five cents on the hundred dollars assessed valuation."

These sections are the constitutional authority for boards of directors of school districts to impose taxes without voter approval. These taxes are those which are levied for the purpose of raising revenue for the district for the payment of teachers, current expenses, etc. But if funds are needed for the purchasing of school sites and erection of schoolhouses, and if the revenue obtained under the levy authorized by said Section 11(b) of Article X is not sufficient, then the voters can authorize additional indebtedness for such purpose. This is the procedure apparently followed by the voters in the district for whom you are making this inquiry.

The constitutional authority for incurring this debt is found in Section 26(b) of Article VI of the Constitution of Missouri, 1945. This section provides as follows:

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

The source of this section is Section 12 of Article X of the Constitution of Missouri, 1875.

Supplementing this constitutional provision is Section 10331, Laws of Missouri, 1945, page 1703, which provides as follows:

"The loan authorized by Section 10328, Revised Statutes of Missouri, 1939, shall not be contracted for a longer period than twenty years, and the entire amount of said loan shall at no time exceed, including the present indebtedness of said district, in the aggregate five per centum of the value of taxable tangible property therein, as shown by the last completed assessment for state and county purposes, the rate of interest to be agreed upon by the parties but in no case to exceed the highest legal rate allowed by contract; when effected, it shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within the time said principal shall become due."

(Underscoring ours.)

This provision seems to answer your question as to the duty of the board to provide for the collection of the annual tax sufficient to pay the principal and interest on the loans as they fall due. Section 10336, R. S. Mo. 1939, provides as follows:

"Boards of directors are hereby authorized to make an estimate for the levy of a tax upon all the taxable property of the school district at its assessed valuation, said tax to be levied and collected as other taxes for school purposes--said tax to be sufficient in amount to pay the annual interest on all bonds of their respective districts, and to pay for the printing or engraving of any bonds that may be issued by virtue of this chapter."

This is further authority for the board to levy and impose a tax sufficient to pay the principal and interest as it falls due.

The foregoing constitutional provisions for incurring indebtedness by school districts are similar to those of the 1875 Constitution and what the courts have said about these provisions in the 1875 Constitution are applicable here.

In the case of Benton vs. Scott, 168 Mo. 379, the court, in speaking of the duty of a school board to provide an annual tax for the sinking fund and interest on bonds issued under Section 12 of Article X of the Constitution of Missouri, 1875, said, l.c. 394:

"By force of this constitutional authority to incur indebtedness, follows the inevitable concomitant, the levy of a tax to pay the interest annually and a sinking fund to pay the principal. So imperative is the command that without farther legislation the school district incurring a debt by issuing bonds could provide for the interest and sinking fund without further legislative authority. * * * "

At l.c. 395, the court further said:

"We think the true interpretation of section 12 of article 10 of the Constitution and the statutes already cited are that the authority conferred upon the board to issue the bonds, by the two-thirds vote of the taxpayers, carried with it the power in the school boards to provide the annual tax for the interest and sinking fund, and that it was a wise precaution to leave the rate for this purpose to be fixed annually by the board according to the needs of the district which should and necessarily must decrease as the bonds are one by one paid off."

Also in the case of Kansas City, Fort Scott & Memphis Railroad Company vs. Chapin, 162 Mo. 409, l.c. 415, the court, in discussing a similar question as to the authority of the directors of a school district to impose a sinking fund and interest fund tax, said:

"The defendant further contends that as in the certified estimates of twenty-four of the districts it does not appear that the 'sinking fund tax' and the 'interest

fund tax' were authorized by a vote of the taxpayers, the court erred in refusing to hold these taxes void. Sections 9757 and 9758, which authorize the boards of education to make estimates for the levy of these taxes do not require that such taxes should be sanctioned by a vote of the taxpayers. The provision in these sections that such taxes are 'to be levied and collected in the same manner as other taxes for school purposes' is not to be construed as a limitation upon the power, but simply as prescribing a mode by which the power is to be exercised. Nor does such a construction render these sections obnoxious to the provisions of article 10, section 11, of the Constitution, which is there dealing with 'annual rates for school purposes,' and not with an existing indebtedness, nor with a tax to be levied to raise funds for the payment of such indebtedness or the interest thereon."

(Section 9758 referred to, supra, is the same as Section 10336, R. S. Mo. 1939.)

We think the foregoing constitutional provisions, statutory provisions and decisions of the court are ample authority for boards of directors of common school districts to impose taxes for the purpose of paying sinking fund and principal on outstanding bonds as they fall due, and that such rates may be in addition to those authorized for the purpose of raising funds for current operations and that such rates may be imposed without authority from the voters, in addition to that authorized at the bond election.

CONCLUSION

From the foregoing, it is the opinion of this department that boards of directors of common school districts may impose an annual tax sufficient to create a sinking fund and pay the annual interest on outstanding bonds, and that such rate may be imposed without further authority from the voters other

Hon. Joseph N. Brown

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than that granted at the bond election, and that this rate may be in addition to the maximum 65¢ rate authorized by the Constitution for current operations of the school district.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

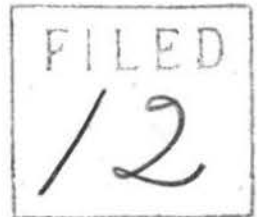
APPROVED:

J. E. TAYLOR
Attorney General *JB*

TWB:VLM

PROBATE COURTS: Probate courts in this state have no power to commit a person under guardianship in said court because of habitual drunkenness to a state hospital or any other institution.

May 19, 1948



5-21
Honorable Joseph N. Brown
Assistant Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Brown:

This will acknowledge your letter in which you request the opinion of this department as to the construction to be given to Section 509, R. S. 1939, whether said section gives probate courts of this state the authority to commit to a state hospital a person who is found to be so "addicted to drunkenness * * * as to be incapable of managing his affairs."

Your letter is as follows:

"We desire to say that it is frequently necessary in this County as it is no doubt in many other counties of this State to file in the Probate Court either an information for a sanity hearing or an information alleging that certain persons are habitual drunkards in order that a hearing may be had to determine whether or not such person is insane or an habitual drunkard. Of course, in cases where the subject is found to be insane there is no question but that under the statute the Probate Court has jurisdiction to commit the subject to a State Hospital for the insane; however, the law is not so plain concerning the jurisdiction of the Probate Court to commit a person to a State Hospital in the event such person is found to be so "addicted to drunkenness * * * as to be incapable of managing his affairs". This question involves the construction of Section 509, R. S. Mo. 1939. Said section being as follows:

"If information, in writing, verified by the informant on his best information and belief, be given to the probate court of any county that any person in its county is so addicted to habitual drunkenness or to the habitual use of cocaine, chloral, opium or morphine as to be incapable of managing his affairs, and praying that an

inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind, and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in section 451, and shall publish the same notice mentioned in section 473; also, shall file an inventory and appraisement, made under the provisions mentioned in sections 461 to 468, both inclusive."(R. S. 1929, Section 508)

"It is to be noted that said section provides that 'the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind.' It seems that the reasonable interpretation of the quoted clause would be that the court would have the same power to commit habitual drunkards as it would in the case of an idiot, lunatic or person of unsound mind. Unless the word "proceed" as used in said section is to be given a restricted or limited meaning.

"We desire to request an opinion from your Department as to the proper interpretation of this section and assure you that we shall appreciate receiving same."

Article 19, Chapter 1, R. S. Mo. 1939, has for its title the following "GUARDIANS OF DRUNKARDS--CONFINEMENT OF DRUG ADDICTS."

The first section of said Article 19, Chapter 1, is Section 509, R. S. Mo. 1939 referred to in your letter, and which has for its title "Guardians of Drunkards, How appointed--Powers and Duties." The full text of said section 509 is as follows:

"If information, in writing, verified by the informant on his best information and belief, be given to the probate court of any county that any person in its county is so addicted to habitual drunkenness or to the habitual use of cocaine, chloral, opium or morphine as to be incapable of managing his affairs, and praying that an inquiry thereinto be had, the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind, and if a guardian

is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian mentioned in Section 451, and shall publish the same notice mentioned in section 473; also, shall file an inventory and appraisement, made under the provisions mentioned in sections 461 to 468, both inclusive."

The sentence which states: "the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind" seems to be the particular part of said section 509 which causes doubt as to the power of the court thereunder to commit a person "so addicted to drunkenness * * * as to be incapable of managing his affairs," to a state hospital.

It must be kept in mind that said section 509 prescribes solely a method of beginning proceedings to determine if drunkards or drug addicts are incapable of managing their affairs, and if found incapable, to appoint guardians for them, and defining the powers and duties of such guardians. We should note carefully the next clause in said section 509 following the clause hereinabove quoted which following clause is: "and if a guardian is appointed on such proceedings, he shall have the same powers and be subject to the same control as the guardian, mentioned in Section 451." (underscoring ours). It also requires the same notice as is required in Section 473, and also he shall file an inventory and appraisement such as must be made under the provisions mentioned in Sections 473 and Section 461 to 468, both inclusive. Said last numbered sections refer to the duties of the court where the subject is found to be of unsound mind. They relate to the appointment of a guardian, the giving of notice of letters, the filing of an inventory and appraisement, determining the qualifications of the guardian so appointed, and the placing of the estate of the insane ward in the hands of the guardian. None of those sections in anywise mention the power of the court to commit a person of unsound mind to a state hospital. Those sections consider and deal only with subjects relating to persons declared to be of unsound mind. Section 509 provides only for "proceedings" looking toward the establishment of guardianship for a person who, by reason of habitual drunkenness, is unable to manage his own affairs. And we may here note the particular significance of the words hereinabove quoted which state "and if a guardian is appointed on such proceedings," he shall have the same powers and be subject to the same control as the guardian mentioned in said Section 451, supra.

Turning again to said section 451, supra, and other sections of Article 18 which prescribe the powers of the guardian of an insane person and the kind and character of control to be exercised under the guardianship and by whom, after a finding of unsoundness of mind of

the subject, we find that Section 451 provides for the appointment of a guardian and curator, and defines the qualifications to be possessed by the guardian, and sets out other provisions respecting the duty of the court to certify, if it be a fact, that such person is a public officer of this state, or of any county in this state, or of any municipality in this state, such facts to the officer or tribunal having power to fill vacancies, such office held by such person of unsound mind being deemed vacant. There is no provision whatever in said Section providing for the commitment of such insane person to a hospital.

Section 473, referred to in said section 509, provides only for the publication of notice of guardianship and the taking physical custody of the property of the insane person. Sections 461 to 468, both inclusive, provide for the administration of the estate of his ward by the guardian. In none of these sections last named do we find any reference to the commitment of a person adjudged to be of unsound mind.

We believe the word "proceed" as used in said Section 509 in referring to Sections 451, 475 and 461 to 468, both inclusive, means that such sections are to be followed only as a guide for the inquiry and the appointment of a guardian for an habitual drunkard. We believe the word "therein" used in the phrase "the court shall proceed therein in all respects as herein provided in respect to an idiot, lunatic or person of unsound mind" means only that the court may proceed in the matters then and there before the court, to-wit, the appointment of a guardian in like manner as is followed in said Section 451 in cases of persons of unsound mind.

In cases of persons declared to be of unsound mind, we find the power of the probate court to make an order for their restraint or commitment provided for in Sections 474, 497 and 498, Article 18, Chapter 1, R. S. Mo. 1939.

Said Article 18, Chapter 1, has for its title "Guardians and Curators of Insane Persons." None of said Sections 474, 497 and 498 is mentioned or referred to in anywise in section 509. There is no reference in section 509, of Article 19, providing for the personal restraint or confinement of a person under guardianship for drunkenness. Section 510 and other sections of said Article 19, do provide for the involuntary confinement of persons who are users of certain drugs, to such an extent as to be defined as "dope fiends" or "addicts", in state hospitals for insane persons, for treatment and cure for such habits, but then only for such time as shall be necessary to accomplish a cure.

The Legislature has not deemed it necessary or proper to include habitual "drunkards" in any statute defining persons who may be committed to state hospitals for the insane, or to any other institution because of it. The title of said Article 19 itself gives, we believe, plain and convincing evidence that the Legislature purposely left out of the title of said article any indication of an intention to provide in the Act for the confinement of habitual drunkards. The title of said Article 19 indicates that in the body of the Act it would be provided for the confinement of drug addicts solely, thereby excluding drunkards and we do so find such provisions in said sections 510, 511, 512, 513 and 514 of said Article 19, Chapter 1.

We believe that the power to commit an habitual drunkard, under guardianship, by order of the probate court, must necessarily be provided for by statute before such person could be deprived of his personal liberty. We find no such statutes, nor do we find any language in any of the sections of said Article 19, giving the power to the court to make such an order. Such power cannot exist by implication.

We do not believe the terms of said section 509 may be so enlarged as to grant such power to the court by stating that "the court shall proceed therein in all respects as herein provided in respect to an idiot or lunatic, or person of unsound mind."

Said Section 509 being merely a procedural statute is ordinarily to be given liberal construction. This rule is of such general understanding and approval that we hesitate to take time to cite authorities. The rule will be found so stated in Section 669, page 1129, 59 C.J. See State ex rel. Smith v. Trimble, 315 Mo. 166; Buck v. St. Louis Union Trust Co., 267 Mo. 644; McManus v. Park, 287 Mo. 109.

Sections 510 and 511 are the only sections in Article XIX of Chapter 1, R. S. Mo. 1939, giving the probate court the right to commit any person. Said sections do specifically mention "dope fiends" as persons who may be committed by the probate court. It does not mention habitual drunkards who have been rendered incapable of managing their own affairs. This would then suggest the application of another familiar rule of construction which is that "the expression of one excludes all others." 59 C.J., Section 582, page 984 states the rule as follows: "* * *Where a statute enumerates the things upon which it is to operate* * *it is to be construed as excluding from its effect all those not expressly mentioned:* * *". See State ex inf. Conkling ex rel. Hendricks vs. Sweaney, 195 S. W. 714.

In the case of State v. Lloyd, 7 S.W.(2d) 344, our Supreme Court in regard to the construction of criminal and penal statutes, lc. 346 said: "* * *Such statutes may not be extended or enlarged by judicial interpretation so as to impress persons not specifically brought within their terms. No one may be made subject to its provisions by implication."

But, should it be asserted that Section 509 is so enlarged, by implication, as to give probate courts the power to deprive a citizen of his liberty while under guardianship, by reason of habitual drunkenness, would place said section in the same class of statutes which requires and admits only of a strict construction, such as criminal statutes or penal statutes. In such case, it would violate Section 10, Article I of the Constitution of this state, 1945, which states: "Due Process of Law--That no person shall be deprived of life, liberty, or property without due process of law." Said statutes, in such event, would, at the same time, violate Section 1 of the 14th Amendment to the Constitution of the United States which, in part, says: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law* * *."

If the probate courts assume the power and authority under Sec. 509 to commit, and do commit, by order, a person under guardianship by reason of habitual drunkenness, it would constitute imprisonment. It would not merely be constructive imprisonment, but actual imprisonment.

31 C.J., page 260, defines imprisonment in various ways. One of such definitions is: "* * *any restraint of the personal liberty of another * * *."

Our Supreme Court has given its definition of the word "imprisonment." The Court in the case of Hyde v. Nelson et al. 287 Mo. 130, defines imprisonment, l.c. 135, as follows: "Imprisonment is the act of putting or confining a man in prison; the restraint of a man's personal liberty: * * *".

In the event that a probate court under the terms of said section 509 should commit to a state insane asylum a person, under guardianship in such court by reason of habitual drunkenness, and the terms of said section were before a court having jurisdiction to be construed, said section would be strictly construed, we believe, in favor of the citizen so committed, and against the statute and the erroneous assumption of such jurisdiction by the probate court, so that any citizen so committed would, upon his petition therefor, be released by the proper writ.

Conclusion

It is, therefore, the opinion of this department, considering the above cited statutes and authorities, that probate courts in this state do not possess the power or authority, under the terms of Section 509, Article XIX, Chapter 1, R. S. Mo. 1939, or under any other statute in this state, to commit a person so addicted to drunkenness as to be incapable of managing his affairs, and under guardianship in

Hon. Joseph N. Brown

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such probate court, to a state hospital, or to any other institution so as to deprive such citizen of his personal liberty.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR 
Attorney General

GWC:mv

TAXATION: Retail sales made by or to an educational institution
SALES TAX: supported by a religious organization are exempt from
provisions of the Sales Tax Act.

January 21, 1948

Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the following statement of facts:

"William Jewell College of Liberty, Missouri has requested that I procure an official opinion from your office as to whether or not the college is required to charge the 2% sales tax for the state on tickets sold to athletic events at the college. Of course you understand that William Jewell College is a purely charitable institution, is not run for profit, and no profits whatever are derived at any time."

Your question refers particularly to sales of athletic tickets by William Jewell College. Under the provisions of the Sales Tax Act, Laws of Missouri, 1945, page 1865, and especially subdivision (b) of Section 11408 thereof, each retailer is required to collect "a tax equivalent to two (2%) per cent of the amount paid, for admission and seating accommodations, or fees paid to, or in any place of amusement, entertainment or recreation, games and athletic events." Under the provision of this section, the college would be required to collect the sales tax on admissions to athletic events, unless it comes within the exemption under Section 11453 of the act, which provides as follows:

"In addition to the exemptions under Section 4, there shall also be exempted from the provisions of this article all sales made by or to religious, charitable, eleemosynary institutions, penal institutions and industries operated by the department

of penal institutions or educational institutions supported by public funds or by religious organizations, in the conduct of the regular religious, charitable, eleemosynary, penal or educational functions and activities, and all sales made by or to a state relief agency in the exercise of relief functions and activities."

If William Jewell College is an educational institution and is supported by a religious organization, then we think it would come within the exemption section. In the case of *State ex rel. vs. Trustees of William Jewell College*, 234 Mo. 299, this court had before it the question of the liability of this college for ad valorem taxes. In that case, an act of the General Assembly was before the court which had exempted the college from the payment of ad valorem taxes. In discussing the rule to be applied to exemption statutes which exempt educational and charitable institutions from taxation, the court, at l.c. 308, said:

"It is urged that exemption statutes are to be strictly construed. Generally speaking, such is the rule. But we take it from the cases that there has been a well recognized exception to the rule. Perhaps a better wording would be to say that the courts have never been over anxious to apply the rule so as to impose burdens upon religious, scientific, literary and educational institutions. Strict construction has largely been applied to corporations organized for profit and gain, not to corporations performing a public service. * * *"

After laying down this principle, the court referred to the act incorporating William Jewell College, l.c. 312, and said:

"The preamble of the Act of 1849 reads:
'Whereas, the United Baptists in Missouri and their friends are desirous of endowing and building up a college in the State, and for that purpose have under the direction of the General Association of Baptists in Missouri already secured pledges to the amount of about twenty thousand dollars, for the endowment of the same in shares

of forty-eight dollars, each payable in installments of six dollars per share annually, now therefore to enable the parties above mentioned to carry out their contemplated purpose, * * *"

From this preamble it will be seen that the Legislature in the 1849 act recognized that William Jewell College was supported by the General Association of Baptists in Missouri, which is a religious organization. In this same case it was stipulated by parties to the suit that William Jewell College is an educational institution, l.c. 305. Therefore, since it is supported by the General Association of Baptists in Missouri, which is a religious organization, then we think there is no question that it would come within the exemption provisions of said Section 11453, and therefore would not be required to charge the two per cent sales tax on tickets sold to atheltic events conducted by the college.

CONCLUSION

From the foregoing, it is the opinion of this department that William Jewell College of Liberty, Missouri, being an educational institution supported by a religious organization, is not required to charge and collect the sales tax on tickets sold to athletic events at the college.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INTOXICATING LIQUOR: (1) Corporation or individual owner, as licensee of several retail stores or outlets licensed to sell intoxicants at retail, may purchase intoxicants, place the intoxicants in central warehouse or on licensed premise, and then distribute the intoxicants as needed to the various licensed stores or retail outlets belonging to this same corporation or individual owner. (2) The transfer of intoxicants from store to store, and between stores or outlets, all belonging to the same corporation or individual owner, as licensee, is not done in violation of the Liquor Control Act of Missouri, particularly Section 4913, R.S. Mo. 1939.

April 12, 1948

Mr. Edmund Burke, Supervisor
Department of Liquor Control
State of Missouri
Jefferson City, Missouri



Dear Sir:

Your opinion request of recent date reads as follows:

"Please let me have your official opinion on the following questions:

"(1) Is it lawful, under the Liquor Control Law of the State of Missouri, for a person or corporation, possessing a number of retail liquor licenses from the State of Missouri to sell intoxicating liquor at various places in the State of Missouri, to purchase large quantities of liquor, have it delivered to a central warehouse or to one of the licensee's licensed premises and then distribute this liquor as needed to the various licensed stores belonging to this same owner to be sold at retail?

"(2) Is it lawful, under the Liquor Control Law of the State of Missouri, for a person or corporation, possessing several licenses to sell intoxicating liquor at retail from the State of Missouri at several different premises in the State of Missouri, to transfer liquor delivered to one of these premises to another store belonging to the same owner to be sold in such other store?"

Since your request proposes two questions, we will consider each question in order.

I.

As we understand your first question, a corporation or individual owns several stores or outlets for the sale of intoxicating liquors at retail, each being properly designated as a place for the retail sale of intoxicants pursuant to Sections 4895, 4898, 4901, R.S. Mo. 1939. The corporation or individual, as licensee, purchases intoxicants, from properly licensed wholesalers, in an amount or quantity sufficient to supply all the retail stores or outlets belonging to the same corporation or individual owner. Having done so, the intoxicants are stored in a central warehouse or on a retail premise described in a license, and then distributed to the retail stores or outlets belonging to the corporation or individual owner as needed. It must be borne in mind that all of these stores or outlets are owned by the same corporation or individual owner. It is true that all are designated as a place of business separately, as required by Section 4897, R.S. Mo. 1939, as a place for the sale of intoxicants at retail. The requirement that each separate place of business must be designated in the license is intended to harmonize with the intent of Section 4881, R.S. Mo. 1939, which requires that all sales of intoxicants take place on the premises designated in the license. It was the obvious intention of the Legislature to confine sales of intoxicants to certain definite areas, as is seen by considering Section 4881, supra. If sales must be confined to premises designated in the license, it is obvious that a separate license designation would be required for each place of sale, even though no such statutory requirement had been expressed by the Legislature. However, the Legislature has made such requirement, and for the purpose of designating the area where sales of intoxicants may be made, a separate license designation is required, Sections 4897, 4881, R.S. Mo. 1939. This requirement does not in any way affect the amount or quantity of intoxicants that may be purchased from the wholesale licensee. And, further, each separate license is issued to the corporation or to the individual owner. Now it is asked whether or not, under these circumstances, the method of operation outlined by your request is lawful under the Liquor Control Act of Missouri.

A prior opinion of this office rendered November 19, 1938, to the Hon. W. I. Bowers, Chief Clerk, Department of Liquor Control, analyzed an identical situation in which "chain" drug companies dealt with intoxicants. In that opinion the facts were that one of the "chain" drug company's retail outlets or stores which held a license as a retail liquor dealer, purchased in-

toxicants from licensed wholesalers in large quantities and then stored same in a warehouse. These intoxicants were then distributed to the other retail outlets or stores from the warehouse as needed. The arguments advanced in that opinion, condemning such a method of operation, a method identical to the method of operation outlined in your opinion request, were threefold: (1) It was argued that each licensed place of business was a separate and distinct place of business, even though "merely a branch place of business of one corporation." This conclusion was arrived at by applying section 4897, R.S. Mo. 1939. (2) It was argued that, being a separate and distinct place of business, the one retail licensee "that is supplying each of the other retail dealers (within the "chain" or corporate organization) and outlets of these corporations * * * * is exceeding its authority granted under its permit." For the reason that by the definition of the authority of a retail license (citing C. J., Vol. 54, page 737), this supplying retail licensee was acting "in the nature of a wholesaler" without authority. (3) Further, it was argued that any of the retail outlets or stores that received the intoxicants they sold or offered for sale "from one of the other retail branches of said corporation" violated the statute proscribing the purchasing of intoxicants by one retail licensee from another retail licensee for the purpose of resale, Section 4913, R.S. Mo. 1939.

The above numbered arguments are the only legal arguments that have been brought forward. We must determine the correctness of said arguments.

We have been unable to find any specific provision of the Liquor Control Act of Missouri which deals directly with the method of operation as outlined. We deem it advisable to set out the statutes, among others, relied on in the prior opinion and referred to above. Section 4913, R.S. Mo., 1939, provides as follows:

"It shall be unlawful for any person in this state holding a retail liquor license to purchase any intoxicating liquor except from, by or through a duly licensed wholesale liquor dealer in this state. It shall be unlawful for such retail liquor dealer to sell or offer for sale any intoxicating liquor purchased in violation of the provisions of this section. Any person violating any provision of this section shall be deemed guilty of a misdemeanor."

This Section presupposes a sale between two retail licensees. To argue that the use of the term "purchase" precludes a sale is to argue the absurd. The retail licensee that purchases or is the buyer is a party to a sale regardless of whatever misnomer or error of terminology the legislature may have used in describing this transaction. Also, under this section it is illegal for the retail licensee who purchased or was sold to by another retail licensee to sell or offer for sale intoxicants which had been the subject matter or property involved in the initial illegal sale provided against by the first portion of Section 4913, supra. In either event, a sale must occur in order for said statute to be violated. Section 4898, Laws of Mo., 1945, provides in part:

"No person, partnership, association of persons or corporation shall * * * *
sell, or offer for sale intoxicating liquor within this state at wholesale or retail, * * * * without procuring a license from the supervisor of liquor control authorizing them so to do. * *
* *" (Underscoring ours.)

Section 4895, R.S. Mo., 1939, provides:

"It shall be unlawful for any person, firm, partnership or corporation to manufacture, sell or expose for sale in this state intoxicating liquor, as herein defined, in any quantity, without taking out a license." (Underscoring ours.)

Section 4900(g), Laws of Mo., 1945, provides, in part:

"(g) Any person who shall sell in this state any intoxicating liquor without first having procured a license from the supervisor of liquor control authorizing him to sell such intoxicating liquor shall be deemed guilty of a felony, * * * *"
(Underscoring ours.)

Section 4901, Laws of Mo., 1945, provides, in part:

"Intoxicating liquor shall be sold at retail in the original package upon a license granted by the supervisor of liquor control, * * * *"
(Underscoring ours.)

We believe it to be obvious that the regulations or restraints found in the Liquor Control Act of Missouri proscribe and control the sale of intoxicants. Therefore, in order for the Liquor Control Act to apply to the method of operation outlined we must find that a sale has been made. The above quoted statutes use the terms "sell," "offer for sale," or "expose for sale." That, we believe, is the statutory standard contained in the Liquor Control Act which determines whether or not an activity is legal or illegal, that is, whether or not there has been a sale in violation of the Liquor Control Act, is the test.

Let us examine the elementary law to determine what a sale is, in law. In the case of *State v. Crumes*, 3 S.W. (2d) 229, 319 Mo. 24, the Supreme Court of Missouri declared the Laws of 1923, page 242, denouncing the selling of intoxicating liquors, covers transactions taking the form of legal sales. At l.c. 230, the court held:

"The general rule is that a sale of chattels, when not otherwise expressly provided or understood, is a sale for cash; that payment and delivery are concurrent. Until payment is made, the buyer has no right of possession, and the title does not pass until the chattel is delivered, (Citing cases.)"

Further definitions of a sale may be found in *Words and Phrases*, Vol. 38, SALE, "Intoxicating liquor," pages 107-108, as follows:

"The essentials of a 'sale' are: First, a mutual agreement; second, competent parties; third, a money consideration; fourth, a transfer of the absolute or general property in the subject of the sale from the seller to the buyer. In charging an illegal sale of intoxicating liquors, an allegation of the price or consideration is indispensable. *City of Cannelton v. Collins*, 88 N.E. 66, 67, 172 Ind. 193, 19 Ann. Cas. 692."

Again, in *American Jurisprudence*, Vol. 30, "Intoxicating Liquors," page 396, Section 268, it reads in part:

"* * * As generally used in statutes or otherwise, with reference to the liquor traffic, the word 'sale' means the transfer of title to intoxicating liquor by valid agreement from one party to another for some consideration. * * *"

What constitutes a sale of intoxicants may also be found in Corpus Juris, Vol. 33, Intoxicating Liquors, page 591, Section 210. The general and essential elements of a sale of personal property generally, are found in the following Missouri cases: "A sale is a contract for the transfer of property from one person to another for a valuable consideration; three things being essential thereto--the thing sold, the price and the consent of the parties, *Barrie v. United Rys. Co. of St. Louis*, 119 S.W. 1020, 138 Mo. App. 557; The elements of a 'sale' at common law are mutual agreement, competent parties, money consideration, and transfer of absolute or general property in the subject-matter, *Wheless v. Meyer & Schmid Grocery Co.*, 120 S.W. 708, 140 Mo. App. 572; A 'sale' is a contract by which property is transferred from the seller to the buyer for a fixed price in money paid or agreed to be paid by the buyer. *Randolph v. Martin*, 86 S.W. (2d) 189; also, *Link v. Kallaos*, 56 F. Supp. 304." So it is seen that, in order for a sale to take place, certain essential requirements of law must be met both as to the sale of intoxicants as a special subject matter of a sale, as well as the sale of chattels generally. By listing the elements of a sale, we can define what is meant by the Liquor Control Act of Missouri where the terms "sell," "sale," "offer for sale" or "expose for sale" are used. From the above quoted authorities, we find the following essential elements necessary in order to classify a transaction as a sale: (1) a mutual agreement; (2) competent parties; (3) money consideration; (4) a transfer of property (possession); (5) a transfer of title.

It might be well to point out that the terms we seek to define are nowhere defined in the Liquor Control Act of Missouri.

Let us place the modus operandi of the corporations or individual owners operating retail stores or outlets, licensed to sell intoxicants at retail, in juxtaposition with the elements of a sale, and determine whether or not the method of operation constitutes a sale.

The first element of a sale is that there must be a mutual agreement. The first element, as stated, means that one person must agree to sell and another person must agree to buy. Some sort of agreement, legally recognizable, between the parties to the sale must be reached. As pointed out above, a corporation which owns several retail outlets or stores obtains a license for each retail outlet, designating such premise as a place licensed for the sale of intoxicants. In view of the fact that the corporation is actually the licensee of each separate place

of business, we are unable to perceive with whom the corporation would mutually agree or contract for the sale of intoxicants. The intoxicants purchased by the corporation's retail licenses has been stored in a warehouse for future distribution. The corporation owns the intoxicants in the warehouse, the corporation owns the various stores or outlets. Can the corporation agree or contract with itself to sell itself property which it already owns? We believe it to be an absurdity to argue or determine that the corporation, as the licensee of each place of business, must enter into a mutual agreement with itself in order to transact a sale of intoxicants, all owned by the same corporation.

Secondly, it is necessary that there be competent parties to a sale. Could Mr. "X," as the sole owner of several retail outlets, licensed to sell intoxicants at retail, deal with himself to sell himself, as a separate entity, property which he already owns? Is the same act necessary to a corporate enterprise? Where is the other competent person in the transaction? Either, where an individual owns several retail outlets, or where a corporation, as the licensee, owns and operates several retail outlets for the sale of intoxicants, there simply is but one legal party to the transaction, whether it be a corporation or individual owner.

Thirdly, there must be a money consideration in order for there to be a sale. The corporation, as licensee for five retail outlets for the sale of intoxicants, purchases intoxicants on its licenses. These intoxicants are then stored in a central warehouse. There can be no question but that the corporation at the end of this transaction owns title to the intoxicants and has at least constructive possession. Now, the corporation, which also owns other stores, distributes from a central warehouse the intoxicants bought on its licenses to the other stores also owned by the corporation. Where is the consideration the stores would pay the corporation? Must the corporation pay itself a consideration for intoxicants legally purchased on its licenses and subsequently transferred to other stores all owned by the said corporation? We think not.

Fourth, there must be a transfer of property from the seller to the buyer, either actual or constructive possession must occur, in order to constitute a sale. Does the corporation transfer property, which it admittedly already owns, by merely distributing

the property to stores it also owns? The corporation owns the chattels in store #1 as much as it owns the chattels in store #3, be they intoxicants or other items. Is the corporation's ownership changed by moving the chattel from store #1 to store #3? If the corporation again moved the chattel from store #3 back to store #1, would its title be restored? We do not believe that there was ever any transfer of title simply because the chattel was moved. The mere movement of chattels from store to store does not fulfill the requirement of a sale that the property should be transferred.

Lastly, there must be a transfer of title to the property in order for there to be a sale. The corporation, as licensee for five retail outlets for the sale of intoxicants, purchases by its licenses intoxicants. Need we argue where title is, obviously in the corporation. It is our view that the corporation has title, dominion and possession of the intoxicants, whether the physical presence of the intoxicants be in any of the stores it owns. It is impossible for the corporation to transfer to itself title which it already possesses. At the time of the sale of the intoxicant to the consumer, who transfers the title? The clerk in the store? The managing officer, or the corporation? From where does the title to the intoxicant emanate? Obviously, the consumer receives his title to the intoxicant from the corporation who owns all the intoxicants in all the stores and, in addition, owns the stores or outlets themselves.

We, therefore, believe that the modus operandi, as engaged in by a corporation or individual owner, owning several outlets or stores for the retail sale of intoxicants, does not constitute a sale within the meaning of the Liquor Control Act of Missouri. At most, it amounts to merely a method of operation peculiar to a corporate organization or by an individual owner of several outlets, and is quite in keeping with the system of free enterprise.

In short, the licenses of the corporation or individual owner used to purchase large quantities of intoxicants, which, after storage in a central warehouse or on a licensed premise, are distributed to other retail outlets by the corporation's order, that act is not being done in the "nature of a wholesaler" for the reason that none of the essential elements of a sale within the meaning of the Liquor Control Act are present in the transfer or transaction outlined in your opinion request. Lacking the elements of a sale, the modus operandi is a method of operation and is not carried on in contravention of law by the corporate licensee which placed the purchase order for the intoxicants.

In 1947, the Supreme Court, Appellate Division, of New York, in the case of Application of Restaurants & Patisseries Longchamps, Inc., et al., 67 N.Y. Sup. (2d) 362, considered a question of fact which appears to be in point. In that case, Longchamps, Inc., a corporation, operated five restaurants. There were also four other corporations, each operating a single restaurant. Purchasing for all nine restaurants, all licensed to sell intoxicants at retail, was done by a common commissary conducted by the Longchamps corporation. Deliveries were made to the separate restaurants from the common warehouse. The charge in that case was made against Longchamps, a corporation owning five retail outlets licensed to sell intoxicants, that by so operating Longchamps was selling liquor at wholesale, and the four other corporations were purchasing from Longchamps at wholesale. The Liquor Authority of New York found Longchamps, Inc., guilty and revoked the licenses of the nine restaurants. However, this determination was annulled by the New York court. The court, in their opinion, at l.c. 364, made the following statement:

"R & P L is not conducting a wholesale business. The alleged wholesaling was only a method of operating a commissary for a chain of restaurants of identical interest and in substance and effect R & P L was purchasing agent for all the restaurants rather than a seller in any ordinary sense."

This case, we believe, is authority approving the business conduct referred to in your request above, and supports the reasoning outlined above.

In answer to your first question, we believe that it is lawful for a corporation or individual, as licensee, owning several retail outlets for the sale of intoxicants, to purchase intoxicants on the licenses so held and store same in a central warehouse or on a licensed premise and then distribute the intoxicants as needed to the various licensed retail outlets belonging to the corporation or individual owner.

Section 4947, R.S. Mo. 1939, and Regulation 12(d), page 119, Rules and Regulations of the Supervisor of Liquor Control, 1946, must be complied with if a central warehouse is used for storage.

II.

Your second question presents the legality of the transfer of intoxicants transferred by one of several corporately owned retail outlets licensed to sell intoxicants directly to another of said retail outlets rather than from a central warehouse. In other words, a corporation owns five retail outlets, all properly licensed for sale of intoxicants at retail. Store #1 transfers legally purchased intoxicants to store #2, both stores belonging to the same corporation or individual owner. Is this transfer in violation of the Liquor Control Act of Missouri? The prior opinion of this office, rendered November 19, 1938, *supra*, held that such transfer of intoxicants was in violation of Section 4913, *supra*. Under the reasoning and authority presented in question I, *supra*, we believe that such a transfer does not amount to a sale within the meaning of the Liquor Control Act. At best, the action is a mere transfer of the physical property already owned, possessed and belonging to the same corporation or individual owner, as licensee of several retail outlets, from one location to another location. There being no sale made by the store or retail outlet transferring the intoxicants to the receiving store or retail outlet, Section 4913, *supra*, has not been violated. Such a method of operation does not violate any other provision of the Liquor Control Act.

CONCLUSION

(1) A corporation or individual owner, as licensee of several retail stores or outlets licensed to sell intoxicants at retail, may purchase intoxicants, place the intoxicants in a central warehouse or on a licensed premise, and then distribute the intoxicants as needed to the various licensed stores or retail outlets belonging to this same corporation or individual owner. This method of operation fails to meet the essential elements of a sale, and, at most, the purchasing store or retail outlet is acting as a purchasing agent or commissary agent and not as a wholesaler.

(2) The transfer of intoxicants from store to store, and between stores or outlets, all belonging to the same corporation or individual owner, as licensee, is not done in violation of the Liquor Control Act of Missouri, particularly Section 4913, *supra*. The transferring store's action does not constitute a

Mr. Edmund Burke

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sale, and the receiving store is merely accepting physical possession of property already owned by the corporation or individual owner of the stores or outlets so operating.

(3) Opinion No. 10, rendered November 19, 1938, to Honorable W. I. Bowers, is no longer to be considered as the opinion of the office of the Attorney General of Missouri.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:LR

CONSERVATION COMMISSION FISH & : Persons taking and possessing
GAME LAWS: : fish from private lakes are sub-
CRIMINAL PROCEDURE: : ject to prosecution unless they
: have obtained a Co. or State fish-
: ing permit, or the owner of said
: lake has obtained a game breeders
: permit and furnished such persons
: with a written statement as pro-
: vided in Secs. 55 & 56, Wildlife
: & Forestry Code of Missouri.

April 30, 1948

FILED NO. 13

Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Bywaters:

This will acknowledge your recent request for an official opinion which, for the sake of brevity, we are restating:

You inquire if persons owning a private lake and all lands completely surrounding said lake, may allow both residents and non-residents of this State to fish therein without a county or state fishing permit, upon the payment of a stipulated fee to the owners of said lake.

Section 8883, R.S. Mo. 1939, placed the ownership of and title to birds, fish and game not held by private ownership, legally acquired, in the State of Missouri.

Under Section 8908, R.S. Mo. 1939, it required anyone desiring to hunt and fish in this State to first obtain a license permitting same, and concluded with the following proviso:

"* * * Provided, no license shall be required to fish in privately owned lakes or ponds where a fee is charged for the privilege of fishing."

The 63rd General Assembly of the State of Missouri, specifically repealed Sections 8864 to 8882, both inclusive, Sections 8883 to 8971, both inclusive, Article 3, all in Chapter 47, R.S. Mo. 1939, and enacted in lieu thereof, twenty-seven new sections (See: pages 664-671, inclusive, Laws of Missouri, 1945).

Section 4, page 665, Laws of Missouri, 1945, goes even farther than did Section 8883, R.S. Mo. 1939, now repealed, by not even excepting from ownership and title to wildlife in the State that which was held by private ownership, and now reads:

"The ownership of and title to all wildlife of and within the state, whether resident, migratory or imported, dead or alive, are hereby declared to be in the state of Missouri. Any person who fails to comply with or who violates this Act or any such rules and regulations shall not acquire or enforce any title, ownership or possessory right in any such wildlife; and any person who pursues, takes, kills, possesses or disposes of any such wildlife or attempts to do so, shall be deemed to consent that the title of said wildlife shall be and remain in the state of Missouri, for the purpose of control, management, restoration, conservation and regulation thereof."

The following decisions hold that such ownership to be in the State of Missouri. In State vs. Heger, 194 Mo. 707, l.c. 711, the Court in holding the ownership of wildlife to be in the State of Missouri, said:

"The Authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the State, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the State, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best.
(Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238; Geer v. State of Connecticut, 161 U.S. 519; American Express Co.

v. People, 133 Ill. 649; Ex parte Maier, 103 Cal. 476; State v. Rodman, 58 Minn. 393; Magner v. People, 97 Ill. 320; Phelps v. Racey, 60 N.Y. 10,)"

Also, in State vs. Willers, 130 S.W. (2d) 256, 1.c. 257, the Court of Appeals in so holding, said:

"Of course, the statute protects only wild birds. The absolute ownership of wild birds is in the State. They are not subject to private ownership. The Legislature may pass such laws granting to individuals the right to kill such birds at such times, or prohibit the killing of them altogether, as the Legislature may deem best. State v. Heger, 194 Mo. 707, 93 S.W 252."

Wildlife is also defined in Section 3, page 665, Laws of Missouri, 1945, as follows:

"As used in this Act, unless the context otherwise requires:

* * * * *

"(b) The word 'wildlife' shall mean and include all wild birds, mammals, fish and other aquatic and amphibious forms, and all other wild animals, regardless of classification, whether resident, migratory or imported, protected or unprotected, dead or alive; and shall extend to and include any and every part of any individual species of wildlife."

Section 17, page 669, Laws of Missouri, 1945, makes it a misdemeanor for any person to have in his possession or under his control any wildlife, except as permitted by this Act in the rules and regulations of the Conservation Commission, and said Section reads:

"Any person who shall have in his possession or under his control any wildlife, except in the manner, to the extent and at the time or times permitted by the provisions of this Act and the rules and regulations of the Commission, shall be deemed guilty of a misdemeanor; and any agent of the Commission, and any sheriff or marshal or deputy thereof is hereby permitted and authorized to take and confiscate any such wildlife from any person so possessing or controlling the same."

Section 26 of the same Act, page 671, Laws of Missouri, 1945, provides that no wildlife shall be pursued, taken, killed, possessed or disposed of except as permitted by such rules and regulations, and reads:

"No wildlife shall be pursued, taken, killed, possessed or disposed of except in the manner, to the extent and at the time or times permitted by such rules and regulations; and any pursuit, taking, killing, possession or disposition thereof, except as permitted by such rules and regulations, are hereby prohibited. Any person violating this section shall be guilty of a misdemeanor."

Section 27 of the same Act further provides that when there is no punishment provided for violation of the rules and regulations and this Act, any person found guilty of violating said rules and regulations or the Act shall be guilty of a misdemeanor, and reads:

"Any person violating any of the provisions of this Act wherein other specific punishment is not provided, any person violating any of such rules and regulations relating to wildlife, shall be guilty of a misdemeanor and upon conviction shall be punished by imprisonment in the county jail not exceeding three months or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Section 3 of the Wildlife-Forestry Code of Missouri, 1947, also provides that no bird, fish, animal or other form of wildlife shall be taken or possessed at any time except as permitted by these regulations and laws consistent with the Conservation amendment of the State of Missouri, and reads:

"No bird, fish, animal or other form of wildlife including their nests, eggs, homes and dens, in the State of Missouri, shall be molested, pursued, taken, enticed, poisoned, killed, transported, stored, served, bought, sold, given away, accepted, or possessed, in any manner, number, part, parcel or quantity, at any time, except as specifically permitted by these regulations, and any laws consistent with Article IV, Sections 40-46 of the Constitution of the State of Missouri."

Section 8 of said Wildlife-Forestry Code provides that wildlife may be taken or possessed only when a person has in his possession a prescribed permit, or when specifically allowed by said regulations to do so without a permit. Said Section reads:

"Wildlife may be pursued, taken, transported, shipped, bought, sold, given away, stored, served, used or possessed only by a person who at the same time has in possession the prescribed permit to do so or who is specifically allowed by these regulations to do so without permit."

Furthermore, Section 9, exempts a farmer fishing on his own farm when done as permitted by said regulations.

Section 19 and sub-section (a) of said rules and regulations require permits of residents of this State before taking and possessing fish, however, excepting therefrom, a resident who is under seventeen years of age. Said Sections read as follows:

"Subject to the provisions of these regulations, permits may be obtained

by residents of this state as evidences of granted and revocable privileges to pursue, take, transport, ship, buy, sell, store, serve, use or possess certain wildlife, throughout the state, except as otherwise specifically provided (see Sec. 19-D), upon the payment of the fees hereinafter stipulated.

"(A) Resident State Fishing Permit \$1.50.-- To pursue, take, possess and transport fish, minnows, crayfish, frogs and other amphibious species upon payment of a resident fishing permit fee of one dollar and fifty cents (\$1.50); provided, that a resident who is under seventeen (17) years of age may exercise these privileges without such permit; and provided also that convalescing veterans who are bona fide patients at a veterans' hospital located in the State of Missouri may exercise these privileges without permit when they are accompanied by and are under the supervision of an employee of the Veterans' Administration, and have in their possession a special permit provided for such purposes."

There is also a provision for a non-resident securing a permit to fish in this State.

Therefore, in view of the foregoing rules and regulations, and statutory provisions, permits are required of persons to take and possess fish in this State except those specifically exempted therefrom in the foregoing statutes and rules and regulations.

There is one way, and only one way, that the owner of a private lake in this State may permit persons to fish therein without a permit, and that is for said owner to take out a game breeder's permit. It follows that he will have to meet all the requirements for obtaining such a permit. These requirements will be found under Section 20, sub-section (b), and Sections 55 and 56 of the Wildlife-Forestry Code of the State of Missouri, which read as follows:

"Sec. 20. Subject to the provisions of these regulations, the following special permits may be obtained from the Commission upon the payment of stipulated fees as follows:

"(B) Game Breeder's Permit \$10.00--To maintain and operate a game farm, fish farm, minnow farm, frog farm, wildlife exhibit or a commercial lake and to exercise the privileges of a game breeder as herein permitted; upon the payment of a game breeder's permit fee of ten dollars (\$10.00), provided, that a commercial lake may be maintained and operated without such permit if fish are taken only within the seasons, limits, methods and conditions herein prescribed for the waters of this state. The Commission may waive such permit fee if the wildlife is held for scientific, educational or propagation purposes under the direction of the Commission or is held in a public zoo operated by a public agency."

"Sec. 55. Game held in captivity, permit required. Game and fur-bearing animals, as herein defined, may be propagated and held in captivity by the holder of a game breeder's permit, subject to the privileges and restrictions herein set forth. Such permit may be granted at the sole discretion of the Commission after satisfactory proof by the applicant that all such game was secured from a source other than the wild stock in this state, and that the applicant is equipped to confine such game for public safety, and to prevent wild game from becoming part of the enterprise; provided, however, that such proof may be waived by the Commission, at its option, in the renewal of any such permits; and provided, that all such game and the increase thereof, shall, within sixty (60) days, or sooner if removed

from the premises, be marked or banded for permanent identification; except that live deer and wild turkeys shall be so marked before shipment. Such identification marks, assigned by the Commission, shall be placed in the skin of the wing of birds, and in the skin of the ear or flank of animals and furbearers. The operation of any such enterprise, which may serve in any manner as a cloak or guise to nullify or make difficult the enforcement of these regulations, shall, at the discretion of the Commission, cause the suspension or revocation of such permit.

"Sec. 56. Privileges of game breeder.-- Game and fur-bearing animals, as herein defined, propagated and held in captivity according to these regulations by the holder of a game-breeder's permit, may be used, sold, given away, transported, or shipped at any time; provided, that all such game shall be accompanied by a written statement by the permittee indicating his permit number and showing truly the kind and number of each species sold, given away, transported or shipped, the name and address of the recipient, and that such game was possessed, sold, given away, transported or shipped by the permittee in full compliance with these regulations. Wildlife which has been propagated in captivity, or has been transported into this state, may be liberated to the wild only under the specific permission and supervision of the Commission."

CONCLUSION

Therefore, if the owner of said private lake has not taken out a game breeder's permit anyone else taking fish out of said lake without a county or state fishing permit is liable to prosecution under the Fish and Game Laws, and rules and regulations adopted by the Conservation Commission. If such a lake is not subject to over-flow or stocked from sources of the State, and the owner of said lake

meets all the requirements under the foregoing provisions, then said owner may take out a game breeder's permit. Thereafter, persons may take fish from said lake without first obtaining a county or state permit to fish therein, provided that the person taking such fish from said lake or having said fish in his possession shall also have in his possession at the same time a written statement from the permittee holding the game breeder's permit, which statement shall contain all the necessary requirements mentioned in Section 56, supra.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J.E. TAYLOR
Attorney General

BD. OF PROBATION &
PAROLE

(1)

Board of Probation & Parole has authority under the law (Sec. 8992.39, Laws of Mo. 1945) to parole (release upon condition) an inmate of a correctional institution of the State of Mo., to the custody of the warden of a penal institution in another State or to the warden of a U.S. Penitentiary; (2) If an inmate is paroled to a detainer said inmate could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution and before the expiration of the Missouri sentence.

May 7, 1948

Honorable Donald W. Bunker
Executive Secretary
Board of Probation and Parole
Jefferson City, Missouri

5-13

FILED
13

Dear Mr. Bunker:

Your opinion request of recent date reads as follows:

"The members of the Board of Probation and Parole should appreciate your opinion relative to their legal authority in the following situation:

"An inmate of the Missouri Penitentiary with a 'hold' or detainer placed against him by the warden of a penal institution in another State, or by the warden of a U.S. Penitentiary, is considered by the board to qualify for parole. The question: Does the Board of Probation and Parole have authority under the law to parole an inmate to the custody of the warden of a penal institution in another State, or to the warden of a U.S. Penitentiary?

"We note under Section 39, page 736, Laws of Missouri 1945, 'Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the Board of Probation and Parole'.

"Another question relative to the same situation: If it is your opinion that an inmate may be paroled to a detainer; is it also your opinion that he could be returned to the Missouri Penitentiary

for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence?"

Since you request the answer to two questions, they will be treated separately.

1) Your first question requests an interpretation of a recent enactment by the Missouri Legislature. Said question reads as follows:

"Does the Board of Probation and Parole have authority under the law to parole an inmate to the custody of the warden of a penal institution in another State, or to the warden of a U.S. Penitentiary?"

We deem it pertinent to review certain general law in regard to paroles, their purpose, extent and effect. Prior to 1945, Section 9160, R.S. Mo. 1939, was a general statute then in effect, relative to the Board and its authority to recommend paroles, commutation of sentence or pardon to the Governor.

In 1945, the Missouri Legislature enacted a new statute, Laws of Missouri, 1945, page 734, Section 35, now known as Section 8992.35, Mo. R.S.A., which created a new Board of Probation and Parole as required by the Constitution of Missouri, 1945. Section 8992.39, Laws of Missouri, 1945, R.S.A., page 54, Cumulative Annual Pocket Part, delineates the powers of this new board and its authority to release on parole any person confined in any correctional institution in this State. Said Section reads as follows:

"Authority in paroles--rules and regulations.-- The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and con-

sider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper correctional institution. Said board may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote."

(Underscoring ours.)

The complete schism between the Governor's present authority relative to paroles and the authority of the present Board of Probation and Parole is further evidenced in the Constitution of Missouri, 1945, Article IV, Section 7, where it expressly provides a limitation upon the Governor's powers. Said Section reads as follows:

"Reprieves, Commutations and Pardons--
Limitations on Power.--The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole."

We further consider it well to define some legal terms for the purpose of clarification and to understand the narrow limits of your question. The distinction between "pardon", "parole", "reprieve", and "commutation of sentence" has often been transgressed, or at least impinged upon, which results in no distinct or precise conception of these legal powers. Evidence of this is found in Words and Phrases, Volume 31, Cumulative Annual Pocket Part, pages 30, 31, "Parole". Referring to Missouri definitions of the above stated legal powers and for our purposes considering them as concise and final definitions, we cite the following cases:

"A 'pardon' is a declaration on record by the chief magistrate of a state or country that a person named is relieved from the legal consequences of a specific crime, or an act of grace proceeding from the power intrusted with execution of laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"Generally, a 'pardon' is an act of grace which exempts individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.--Hughes v. State Board of Health, 159 S.W. 2d 277, 348 Mo. 1236."

"A 'reprieve' is the withdrawing of a sentence for an interval of time whereby the execution is suspended, and it does not annul the sentence but merely postpones it.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"A 'commutation of sentence' is the change of a punishment to which a person has been condemned to a less severe punishment by authority of law.--Lime v. Blagg, 131 S.W. 2d 583, 345 Mo. 1."

"A 'parole' is not a 'conditional pardon', but rather a conditional release from confinement having as its objective rehabilitation of the prisoner. Mo. R.S.A. Secs. 4199-4207; Mo. R.S.A. Const. art. 4, Sec. 7.--State v. Brinkley, 193 S.W. 2d 49, 354 Mo. 1051."

Pursuant to the statute, and under the above definitions, the Board of Probation and Parole has only the authority to parole, and this authority should not be confused with the power to "pardon", "reprieve" or "commute sentence". Since Section 8992.39, supra, expressly provides that every person on parole shall remain in the legal custody of the institution from which he was released, the term "legal custody" has, we believe, special significance. In Corpus Juris, Volume 17, page 441, the definition of "custody" is found:

"The term in criminal law is the same thing as detention in civil law, and is synonymous with imprisonment, meaning the detention of a person contrary to his will; in actual confinement or the present means of enforcing it. The term implies physical force sufficient to restrain the prisoner from going at large."

(Underscoring ours.)

One other statute to be considered in its general application to your question was enacted, Laws of Missouri, 1945, page 737, Section 46, and now found as Section 8992.46,

page 55, Cumulative Annual Pocket Part, R.S.A., which provides that this State may enter into compacts with other States affecting persons on probation or released on parole. Said Section provides:

"The governor is hereby authorized and directed to enter into a compact on behalf of the state of Missouri with any and all other states of the United States legally joining therein and pursuant to the provisions of an act of the congress of the United States of America granting the consent of congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes, which compact shall have as its objective the permitting of persons placed on probation or released on parole to reside in any other state signatory to the compact assuming the duties of visitation and supervision over such probationers and parolees; permitting the extradition and transportation without interference of prisoners, being re-taken, through any and all states signatory to said compact under such terms, conditions, rules and regulations, and for such duration as in the opinion of the governor of this state shall be necessary and proper."

With these statutes and general law in mind, we will apply them to your precise question. However, it must be borne in mind that there have been no judicial interpretation of this section regarding your particular question. With the definition of "parole" in mind as being a conditional release from confinement we believe that the Board of Probation and Parole has authority to parole (keeping in mind that narrow authority) an inmate to the custody of the warden of the penal institution in another state, or to the warden of a United States Penitentiary. As the paroling of an inmate is a "conditional release", the Board of

Probation and Parole is undoubtedly authorized to attach to, and condition a parole upon any grounds other than those grounds that are illegal, immoral or impossible of performance: Ex parte Webbe, 30 S.W. (2d) 612. This construction of conditions was also applied to a commutation of sentence by the Governor in the case of Silvey vs. Kaiser, 173 S.W. (2d) 63. We are unable to perceive any legal or moral objection to the granting of a parole by the Board of Probation and Parole of Missouri to an inmate of a correctional institution in this State, on the condition that he surrender himself to out-state authority for the purpose of facing charges or serving a sentence in said other State. The election to accept said parole, and its accompanying condition resides in the inmate to be paroled. If the inmate to be paroled accepts such a condition he does so of his own free will, and the only restrictions on said condition are found in the Webbe case, supra. We see nothing illegal, immoral or any impossibility of performance in a condition by the Board of Probation and Parole that an inmate of a correctional institution in Missouri will be offered a parole therefrom, on the condition that he surrender to the custody of the warden of a penal institution in another State, or to the warden of a United States Penitentiary.

In regard to the legal custody of the parolee we believe that, in the event Missouri and the detaining State had entered into a compact pursuant to the provisions of Section 8992.46, supra, that Missouri would, according to the definition from Corpus Juris, supra, have the present means of enforcing the conditions of the parole. That pursuant to such compact with the State to whom the inmate was paroled, said parolee, for all practical purposes, would still be in the legal custody of Missouri, and amenable to the orders of the Board of Probation and Parole. Compacts pursuant to Section 8992.46, supra, have been held to be constitutional and enforceable.

In the case of Ex parte Tenner, 128 Pa. (2d) 338, in regard to the authority of a State, a party to such a compact, to cross State lines, the Court said:

"The administration of parole is an integral part of criminal justice, having as its object the rehabilitation

of those convicted of crime and the protection of the community. Unquestionably such rehabilitation of a parolee may often be facilitated by transferring him to another state, with new surroundings and better opportunities for employment. It is apparent, however, that the success of such out-of-state transfers requires adequate control and intelligent supervision of parolees during the period of their readjustment to civil life. And from the standpoint of the protection of society, there is sound reason for an agreement between states that the authority over parolees should follow them across state lines. The knowledge on the part of the out-of-state parolee that he may summarily be returned to prison for any violation of the rules which he has agreed to obey undoubtedly is an effective check upon any inclination to violate parole.

"The compact represents the social policy of both California and Washington in this regard. It is an agreement for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of the criminal laws of each state within the contemplation of the federal legislation and therefore does not violate the prohibition of the Constitution concerning compacts between states."

(Underscoring ours.)

In the event an inmate of a correctional institution of the State of Missouri is paroled to a State with whom Missouri has no compact pursuant to Section 8992.46, supra, the legal custody would, in the view of this Department, be surrendered at the moment the parolee crossed the intervening State line. In the Tenner case, supra, recognition of this situation is found in the following statement:

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. * * *".

In answer to your first question stated above, we believe that the Board of Probation and Parole does have authority under the law to parole an inmate on condition that said inmate accept the custody of the warden of a penal institution in another State, or the warden of a United States Penitentiary. As long as the conditions attached to the release (parole) are not illegal, immoral or impossible of performance, any condition may be attached to said parole. Pursuant to the Tenner case, supra, if Missouri is a party to a compact under Section 8992.46, supra, with the other State, for all practical purposes, we believe Missouri to have legal custody in sufficient substance to enforce the conditions of its parole. If no compact exists between Missouri and the other State then the Federal right of extradition exists, and is sufficient to provide for enforcing the conditions of the parole.

2) Your second question reads as follows:

"If it is your opinion that an inmate may be paroled to a detainer; is it also your opinion that he could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence?"

Honorable Donald W. Bunker -10-

We believe that, under the reasoning and authority cited above, your second question is, for all purposes, answered.

Briefly, if an inmate is paroled to a State which has filed a "hold" or "detainer" order against him in this State, and he is subsequently paroled to said demanding State where he serves a sentence and is released by the out-of-state institution, and then violates the conditions of the Missouri parole before its expiration, Missouri may resort to the enforcement of its parole (conditional release) under its compact with said other State, or to the Federal remedy of extradition.

CONCLUSION.

1) It is the view of this Department that the Board of Probation and Parole does have authority under the law (Section 8992.39, Laws of Missouri, 1945), to parole (release upon condition), an inmate of a correctional institution of the State of Missouri, to the custody of the warden of a penal institution in another State or to the warden of a United States Penitentiary.

2) It is also the opinion of this Department that, if an inmate is paroled to a detainer, said inmate could be returned to the Missouri Penitentiary for a parole violation which occurred after his release from the out-of-state institution, and before the expiration of the Missouri sentence.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:ir *983*

APPROPRIATION: Present claim for a refund may be assigned.
REFUND:

FILED
13

July 29, 1948

Blair
Mr. Edmund Burke
Supervisor
Department of Liquor Control
Jefferson City, Missouri

8-6

Dear Mr. Burke:

Your opinion request of recent date has been assigned to the writer for answer. In said request you state:

"Under date of March 24, 1947, Schulte & Long, who were licensed as wholesale solicitors by the Supervisor of Liquor Control of the State of Missouri, made application for refund from the State of Missouri for Missouri excise inspection stamps or labels and, in support of their claim, submitted an affidavit stating they desired to have the Missouri stamps destroyed on a large amount of liquor which they were returning to their original supplier, namely, Philip Blum & Company of Chicago, Illinois.

"This claim went through the usual routine, and an agent of this department witnessed the destruction of these stamps, making proper affidavit thereto, and, in due course, the claim was presented to the Legislature of the State of Missouri for its consideration, along with a large number of similar claims, and the claim was included in House Bill No. 484, Section 9.210. This House Bill No. 484 was truly agreed to and finally passed, Section 9.210 appropriating in the sum of \$125,842.11 to purchase liquor and beer stamps to be refunded to the following named persons or companies to replace stamps not used and

cancelled, under the direction and under the supervision of the Supervisor of Liquor Control,' and included in the list was the item to Schulte & Long for \$5,760.00.

"On or about March 15, 1948, the Boatmen's National Bank of St. Louis, Missouri, wrote to Mr. Everette Rutledge, Chief Clerk of the Supervisor of Liquor Control, advising us that in connection with certain loan transactions between the Boatmen's National Bank of St. Louis and Schulte & Long, the aforementioned claim for refund of stamps had been assigned to said bank and requesting that a refund check be sent to the bank. The assignment referred to was dated October 23, 1947. (I have a photostatic copy of this assignment, which I will submit to you for examination upon request.)

"Under date of June 29, 1948, James J. Rank, Attorney at Law, 1062 Paul Brown Building, St. Louis, Missouri, advised me that Schulte & Long had executed to him an assignment for the benefit of creditors. This assignment was dated June 3, 1948. (I have a copy of this assignment, which I will submit to you upon your request.) My information is that this assignment for the benefit of creditors was not filed in the Circuit Court but was agreed to by all, or most, of the unsecured creditors.

"Both the Boatmen's National Bank and Mr. Rankin claim to be entitled to this refund. Will you please let me have your opinion as to whom I should turn over this refund, and further as to whether or not the refund can be paid in money or will have to be paid in stamps."

Under the facts stated in your letter above, you specifically inquire, "to whom should I turn over this refund." In order to arrive at a conclusion determinative of that question, it is first necessary for us to consider whether or not claims

against the Government for a refund are assignable. Should the law specifically declare that such a claim for refund, as presented here, is not assignable, it would seem apparent that your statutory duty would be to present the refund to Schulte & Long, Distributors, St. Louis, Missouri. The general rule is that appropriation acts must be strictly construed: See *Meyer v. Kansas City*, 18 S.W. (2d) 900, 323 Mo. 200; *State v. Weatherby*, 168 S.W. (2d) 1048, 350 Mo. 741. Should we conclude that a claim for refund against the Government is assignable, an entirely different situation will then present itself. Therefore, in our opinion, your request presents the initial question: whether or not a claim for refund, for which the Legislature of this state has appropriated money, can be assigned. The Appropriation Act, House Bill No. 484, passed April 19, 1948, signed by the Governor June 3, 1948, pages 14-15, Section 9.210, appropriates out of the state treasury, chargeable to the General Revenue Fund, the sum of \$5,760.00 to Schulte & Long, Distributors, St. Louis, Missouri, (H. B. 484, page 20, lines 197-198). According to your letter, Schulte & Long had made assignments of this claim to the Boatmen's National Bank of St. Louis, Missouri, under date of October 3, 1947, and to James J. Rank, Attorney at Law, St. Louis, Missouri, under date of June 3, 1948. Both parties are now claiming the entitlement to this particular refund claim, and the appropriation therefor, against the State of Missouri, as assignees of Schulte & Long.

The writer was unable to find in the State of Missouri any direct authority dealing with a situation like this. However, in 134 A.L.R. 1198, the assignment of a claim for a tax refund is annotated. Therein, at page 1202, it reads:

"The general rule, in the absence of language of the statute prohibiting it, is that claims against the government are assignable. * * * *"

Analyzing the case of *State ex rel. Ben Stone v. Nudelman*, 376 Ill. 535, 34 N.E. (2d) 851, the court established as a general rule that, in the absence of a statute forbidding it, claims against the Government, are, as a general rule, assignable. The court cited several cases, and in particular the case of *Milnor v. Metz*, 41 U.S. 221, 10 L. Ed. 943. In that case, Milnor had been employed by the United States as a gauger for the Port of Philadelphia, and having rendered unusually laborious duties, Milnor petitioned Congress in

January, 1838, for payment, for these duties performed, over and above his statutory salary. In May of 1840, Congress passed an act granting Milnor's request for payment. Prior to the passage of this relief act, Milnor took bankruptcy, and one Metz became the sole assignee of all of Milnor's claims. Metz then was the assignee prior to the passage by Congress of the appropriation act granting to Milnor the moneys petitioned for by reason of the discharge of his additional labors. After Metz became the assignee, Congress passed an act allowing this money to Milnor, and Metz applied to the Treasury Department claiming the amount of the sum allowed to Milnor by Congress. This application by Metz was rejected by the Treasury Department, and suit was instituted. Both the lower court and the appellate court entered a decree in favor of Metz as assignee of Milnor. That particular case, upholding the assignment of a claim against the Government by the claimant, even prior to the appropriation of the money necessary to pay the claim, is authority for the proposition that claims against the Government, in the absence of an express statute, are assignable even though said assignment is made prior to an appropriation for payment thereof.

In your request, we have the additional fact of a dispute existing between two claimants, both assignees, as to whom shall receive the refund. Under the facts of your letter, it would seem to be an impropriety for this office to attempt to determine the judicial validity of the disputed assignment in the present instance. Prior to 1943 Missouri relied upon the equitable procedure of a bill in interpleader to determine the rights of two or more persons severally claiming the same debt, duty or thing from the complainant under different titles or in different interests, and the complainant, claiming no title or interest for himself and not knowing to which of the claimants he should render the debt or duty or deliver the property, and the claimant being further in fear that he may suffer injury or be molested by an action unless the claimants are all brought into court and required to interplead their claims: See, *Baden Bank of St. Louis v. Trapp*, 180 S.W. (2d) 755. In laws of 1943, page 353, Section 18, now Section 847.18, Mo. R.S.A., the statute provides:

"Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that

the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counter-claim. The provisions of this section supplement and do not in any way limit the joinder of parties permitted in section 16 of this code."

This statute is taken from the Federal Rule 22(1), and has been construed not to destroy the remedy of interpleader as required in equity but merely to broaden its scope and is purely procedural. Moore v. McConkey, 203 S.W. (2d) 512.

CONCLUSION

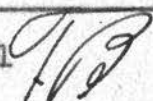
The present claim for a refund, under the facts of your letter quoted supra, would, therefore, seem to be assignable, and should, in our opinion, be disposed of by a bill in interpleader under the authority cited above.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General



WCB:LR

MAGISTRATES: Justices of the peace qualified for ap-
JUSTICES OF THE PEACE: pointment as additional magistrate.

August 2, 1948

Honorable L. Madison Bywaters
Prosecuting Attorney
Clay County
Liberty, Missouri



Dear Mr. Bywaters:

This is in reply to your recent letter requesting the opinion of this department on the following question:

"Is a person who was a Justice of the Peace on February 27, 1945, or who had heretofore been a Justice of the Peace in this State for at least four years, eligible to appointment as an additional Magistrate in counties of the third class in which the population is over 30,000?"

The provision for the appointment of additional magistrates is found in the act of the 63rd General Assembly, known as the Magistrate Law, Laws of Missouri, 1945, page 765, Section 1, as modified by the decision of the Missouri Supreme Court in State ex rel. Randolph County v. Walden, Special Judge, 206 S.W. (2d) 979. Such additional magistrates must possess the same qualifications as provided by law for regularly elected magistrates.

The qualifications required of magistrates are set out in the Constitution, Article V, Section 25, as follows:

"Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the

Honorable L. Madison Bywaters

peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

This constitutional provision is implemented by Section 3 of the above act by the 63rd General Assembly, which reads:

"Each judge of magistrate court shall be a qualified voter of this state, at least twenty-two years of age, and a resident of the county for at least nine months, next preceding his election, and shall be licensed to practice law in this state; except that, in counties of 30,000 inhabitants or less, a probate judge who succeeds himself as probate judge may serve as judge of the magistrate court without being so licensed, and except that persons who were on February 27, 1945, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being licensed to practice law. No magistrate shall receive any other or additional compensation for any other public service or practice law or do law business while he is magistrate."

These sections require judges of the magistrate court to be licensed to practice law in this state but provide an exception to this effect: "persons who were on February 27, 1943, justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being licensed to practice law."

There are no restrictions in either the Constitution or the statutes comprising the Magistrate Law limiting this provision with regard to the time such persons shall be eligible for the office of such magistrate. The law is clear, and the intent of the Legislature seems evident that persons who were justices of the peace on February 27, 1945, or who have been justices of the peace for at least four years sometime during their lifetime, are eligible for the office of magistrate without being licensed to practice law in this state, provided they comply with all other legal requirements. It is well settled in Missouri that when the wording of such constitutional and statutory provision is plain and unambiguous it must be given effect as written.

Honorable L. Madison Bywaters

We are aware of the limited reliance which must be placed on the Debates of the Constitutional Convention, however they are of value in this case and entitled to some weight. (State ex rel. Randolph County v. Walden, supra.) At page 2871 of the Debates of the 1943-1944 Constitutional Convention of Missouri that portion of Article V, Section 25 of the Constitution, which is under consideration here, was discussed as follows:

"MR. ALLEN: Was it the intention of the Committee, Mr. Robison, in the use of these words in lines 17 and 18 -- 16, 17, 18 and 19, quote 'except that persons who are now justices of the peace, or who have heretofore been justices of the peace for at least four years, shall be eligible to the office of magistrate' -- was it the intention of the Committee that those words 'for at least four years' meant four years prior to the adoption of this Constitution or prior to the adoption of the time this constitutional provision went into effect? I merely ask that for the record. Or was it the intention of the Committee that anyone who in his lifetime had served four years as a justice of the peace would in the future be eligible for election to that office even though he was not licensed to practice law?

"MR. ROBISON (OF DEKALB): Mr. Allen, I could give you my construction on that. However, I am not the author of that Section. Senator Phillips from St. Louis offered, I think, that part of the Section and I would rather he give his intention.

"MR. ALLEN: I beg your pardon. May I inquire from Senator Phillips? Did you hear my question, Senator?

"MR. PHILLIPS (OF ST. LOUIS CITY): As I understood your question, why yes, to the last part of it.

"MR. ALLEN: That is that anyone who had ever served as a justice of the peace at any time within his lifetime, for a period of four years, whether or not it was immediately preceding the adoption of this Section by the people would be eligible to be elected a magistrate without being a licensed attorney?

Honorable L. Madison Bywaters

"MR. PHILLIPS (OF ST. LOUIS CITY): That's right, and the reason was that we considered four years experience as a justice of the peace would give the man sufficient qualifications to make up for the lack of a license to practice law."

An examination of the above excerpt from the record discloses that the meaning of the phrase in question was clearly stated by its proponents as we have concluded above. It was clearly indicated there that any person who at any time in his lifetime served four years as a justice of the peace was eligible after the adoption of the Constitution or in the future for the office of magistrate, the reason being that four years experience as a justice of the peace would qualify a person for the office of magistrate regardless of his lack of a license to practice law.

CONCLUSION

In view of the foregoing, it is the opinion of this department that a person who was a justice of the peace on February 27, 1945, or who has heretofore been a justice of the peace in this state for at least four years, is eligible for appointment as an additional magistrate under the provisions of the Laws of Missouri, 1945, page 765, Section 1.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

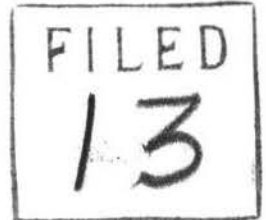
J. E. TAYLOR
Attorney General

INSANE PERSONS: Probate Court of County wherein a State Hospital is located does not have jurisdiction to pass upon the sanity of pay patient within such hospital unless they are residents of that county.

November 10, 1948

F I L E D 13

Honorable L. M. Bywaters
Prosecuting Attorney
Liberty, Missouri



Dear Sir:

We have your letter of recent date which reads as follows:

"I should like to have an official opinion from your department on the following matter:

In the early part of 1948, a resident of Clay County, Missouri, was accepted at State Hospital Number Two, St. Joseph, Missouri, as an insane pay patient. Such person was not adjudicated to be insane by any court. It is now impossible for said patient to continue as a pay patient and it is now necessary and expedient that proceedings be instituted to have her declared to be of unsound mind and to be indigent. Our Probate Court advised the father of this party that proceedings could be instituted in reference to such in Buchanan County but the Judge of the Probate Court of Buchanan County has declined to accept jurisdiction on the theory that State Hospital Number Two is not a public, charitable institution as provided in Section 9344 of the Missouri Revised Statutes annotated.

This situation is likely to occur many times in the future and for that reason our Probate Judge would like to know as to whether or not Section 9344 of the 1947 cumulative annual pocket parts of Missouri Revised Statutes annotated applies to the above set of facts."

Evidently the patient mentioned in your letter was admitted to the State Hospital under authority of Section 9322, R.S.Mo. 1939, which reads as follows:

"Pay patients, or those not sent to the hospital by order of the court, may be admitted on such terms as shall be by this article and the by-laws of the hospital prescribed and regulated."

Sections 9323 to 9327 of the statutes set forth the terms upon which such paypatients may be admitted.

A pay patient would not lose his residence by reason of being temporarily in a State Hospital for treatment, but he would continue to be a resident of the county where he resided when taken to the hospital. Section 9328, P. 905, L. 1945, provides in part as follows:

"The probate courts of the several counties shall have power to send to a state hospital such of the insane poor of their respective counties as may be entitled to admission thereto."

If, therefore, a pay patient while being treated at private expense at a state hospital becomes indigent and unable to pay for further treatment, he would be a proper subject to be sent as an insane poor person by the county of his residence. Section 9335, P. 905, L. 1945, provides how proceedings to have an insane poor person sent to a state hospital shall be commenced. It reads in part as follows:

"For the admission of insane poor persons the following proceedings shall be had:
Some citizen residing within the county, of which the alleged insane person is a resident, shall file with the Judge or Clerk of the Probate court of such county a verified statement in writing which shall be substantially as follows: * * * "

It is clear, therefore, that if a pay patient in a state hospital becomes indigent he is a proper subject to be brought before the Probate Court of the county of his residence on a hearing to determine whether he is insane and whether he should be confined.

Section 9344, P. 905, L. 1945, deals with an entirely different class of insane persons. It deals with persons who become insane while being cared for in private or public charitable institutions. It provides as follows:

"Whenever an inmate of a private or public charitable institution for the maintenance and care of indigent persons shall become insane, any citizen may file in the probate court of the county where such institution is located, a statement in writing substantially complying with the form set forth in Section 9335 of this act, and shall in addition thereto allege in said statement the county in this state of which said insane person was a resident immediately prior to his admission to said charitable institution. The clerk of the probate court in which such statement is filed shall proceed therewith as provided in Section 9336 of this act, and shall forward to the clerk of the county court of the county of which said insane person is alleged to have been a resident immediately prior to his admission to said charitable institution, a copy of such statement and a notice of the place and time when said statement will be presented to the court, which shall not be less than twelve days after the notice is deposited in the mail as herein-after provided. The copy of said statement and said notice shall be placed in a well-secured envelope, directed and addressed to the clerk of the county court of the county to whom the same is herein required to be forwarded, deposited in the postoffice, postage prepaid, and registered in accordance with the postal laws of the United States of America; the return of such service shall be indorsed on a copy of the notice so sent by the clerk or his deputy and shall be conclusive evidence of the matters therein contained, and shall confer complete jurisdiction upon the court in which the statement is filed to hear and determine the same. Provided, however, the alleged insane person shall be entitled to the notice provided for in Section 9336 of this act. Said probate court shall hear said matter on the

date mentioned in said notice or upon any day to which said court shall adjourn or continue the hearing thereof, in the manner now provided for resident insane persons. If the person charged shall be found by the court to be insane and indigent and to have been a resident of the county as alleged in said statement immediately prior to his admission to said charitable institution, its judgment shall entitle said person to admission to a state hospital upon the same terms as resident insane and indigent persons, and the county of which such insane person is found to have been a resident immediately prior to his admission to such charitable institution shall pay all costs and expenses and provide all things required by this article, the same as if said person had been sent to the state hospital as an indigent insane person by order of the court of the county of which he is found to have been a resident immediately prior to his admission to said charitable institution."

A state hospital is not a charitable institution. The state in caring for indigent insane persons is not doing charity but is discharging a duty to care for such of its citizens as are unable to care for themselves.

Conclusion

It is, therefore, the opinion of this office that the Probate Court of the county wherein a state hospital is located does not have jurisdiction to pass upon the sanity of a pay patient in such hospital, unless such patient is a resident of that county, but the Probate Court of the county of which such pay patient is a resident has such jurisdiction.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General

*Sent
Spec delivery*

CORONERS:

If coroner is unable to take inquest, any magistrate, or judge of the court of record of the county may take the inquest.

October 14, 1948

10-14

FILED

14

Honorable Thomas Callanan
Coroner of the City of St. Louis
St. Louis, Missouri

Dear Sir:

This Department is in receipt of your request for an official opinion in which you ask, if a coroner is unable to take an inquest for any reason, who is the proper person to take such inquest.

Section 13243, R.S. Mo. 1939, provides as follows:

- "If the coroner is unable to take the inquest, any justice of the peace, or any judge or justice of some court of record of the proper county, may take the inquest and perform all the duties hereby enjoined on the coroner."

Section 1, Laws of Missouri, 1945, page 1079, provides that, whenever the words "justice of the peace" appear in any statute, such words shall be deemed to include and refer to "magistrate".

Section 1, Laws of Missouri, 1945, page 806, sets forth which courts are courts of record in this state, and provides as follows:

"That Section 1990 of Article 1, Chapter 10, Revised Statutes of Missouri, 1939, relating to what courts shall be courts of record, be and the same is hereby amended by striking out of the fourth line thereof the words, 'county courts' and inserting in lieu thereof the words, 'the existing courts of

common pleas, magistrate courts' so that Section 1990, as amended, shall read as follows:

"Section 1990. Courts of record--The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the existing courts of common pleas, the magistrate courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Section 2239, R.S. Mo. 1939, provides that the St. Louis court of criminal correction shall be a court of record.

Section 655, R.S. Mo. 1939, states that, whenever the word "county" is used in any law, general in its character, the same shall be construed to include the City of St. Louis. Therefore, under the provisions of Section 13243, supra, if the coroner is unable to take the inquest then any magistrate of the City of St. Louis, any circuit judge or the judge of the court of criminal correction of that city, or the judge of the probate court may take the inquest and perform all the duties enjoined on the coroner in such matters.

CONCLUSION.

It is, therefore, the opinion of this Department that: if the coroner of the City of St. Louis is unable to take an inquest then any magistrate, circuit judge, judge of the court of criminal correction, or probate judge of the City of St. Louis may take the inquest and perform all the duties enjoined on the coroner.

Respectfully submitted,

APPROVED:

ARTHUR M. O'KEEFE
Assistant Attorney General

J. E. TAYLOR
Attorney General

AMO'K:ir

RECORDER OF DEEDS: Under Section 3364, page 640, Laws of Missouri,
MARRIAGE: 1943, applications for marriage license must
be presented and filed with the recorder of
deeds that issues said license.

January 17, 1948

FILED

15

Honorable Cleo V. Cauthon
Clerk of the Circuit Court and
Ex-Officio Recorder of Deeds
St. Clair County
Osceola, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion which reads:

"I would like the opinion of your office
on the following question. CAN A RECORDER
ISSUE A MARRIAGE LICENSE TO AN APPLICANT
ON PRESENTATION OF THE APPLICATION FILED
IN ANOTHER COUNTY BY THE APPLICANT? Even
though all requirements of Blood Test and
the three day waiting period are met.

"I am enclosing an application from
Phelps County as Enclosure A. Could the
Recorder of St. Clair or Cedar or some
other county issue a marriage license on
presentation of this application by the
applicant?"

The primary rule of statutory construction is to ascertain
and give effect to the lawmakers' intent from words used, if
possible, and to that end, courts will look less to the letter
or words of a statute and more to the context, subject matter,
consequences and effect. See City of St. Louis vs. James
Braudis Coal Company, 137 S.W. (2d) 668; also City of St.
Louis vs. Pope, 126 S.W. (2d) 1201, 344 Mo. 479.

The specific provision to be construed is Section 3364,
page 640, Laws of Missouri, 1943, which reads:

"Previous to any marriage in this state,
a license for that purpose shall be obtained
from the officer authorized to issue the
same, and no marriage hereafter contracted
shall be recognized as valid unless such
license has been previously obtained, and

unless such marriage is solemnized by a person authorized by law to solemnize marriages. Before applicants for a marriage license shall receive a license, and before the Recorder of Deeds shall be authorized to issue a license, the parties to the marriage must, at least three days before the date they desire such license to be issued, present an application for the license to the Recorder of Deeds. Upon the expiration of three days after the receipt of such application, duly executed and signed, the Recorder of Deeds shall issue the license, unless one of the parties withdraws the application. Provided, however, that said license may be issued on order of the Circuit or probate court or a judge thereof in vacation of the County in which said license is applied for, without waiting three days as herein provided, such license being issued only for good cause shown and by reason of such unusual conditions as to make such marriage advisable. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor. Common law marriages hereafter contracted shall be null and void. Provided, however, that no marriage shall be deemed or adjudged invalid, nor shall the validity thereof be in any way affected on account of any want of authority in any person so solemnizing the same under the next preceding section, if consummated with the full belief on the part of the persons, so married, or either of them, that they were lawfully joined in marriage."
(First underscoring ours.)

There is no specific requirement that said application must be obtained from the recorder in the county that issues the marriage license. Therefore, we believe as a prerequisite for securing a marriage license that persons may obtain applications for said marriage license from any recorder of deeds. However, when properly executed, said applications must be filed with the recorder of deeds that issues the marriage license. The very words used in Section 3364 so indicate by providing that before applicants for a marriage license shall

receive a marriage license, the parties to the marriage must, at least three days before they desire such marriage license to be used, present an application for the license to the recorder of deeds. Then, upon expiration of three days thereafter, the receipt of such application duly executed and signed, the recorder shall issue the license, which clearly indicates that the same recorder that receives said application for a marriage license three days thereafter shall issue the license. There is no provision included in said section to authorize a recorder of deeds to recognize the presentation and filing of said application with some other recorder of deeds in this state and then to issue a marriage license to said applicants.

We are inclined to believe that Section 3364, supra, is not ambiguous, and therefore, leaves no room for construction. The courts have often held that where the language of a statute is plain and admits of but one meaning, there is no room for construction. See Cummins vs. Kansas City Public Service Company, 66 S.W. (2d) 920, 334 Mo. 672. To hold any other way than that the application must be filed with the recorder issuing the license would lead to utter confusion and abuses. Had the Legislature, in enacting Section 3364, supra, intended that said application for marriage license should be presented to any recorder of deeds in the state, and that it was not necessary that it be presented only to the recorder issuing the marriage license, it could have specifically provided so for same. Under the circumstances, we believe that Section 3364, supra, clearly indicates that such application for marriage license shall be presented only to the recorder issuing the license.

CONCLUSION

Therefore, it is the opinion of this department that applications for marriage licenses, under Section 3364, page 640, Laws of Missouri, 1943, must be presented to the recorder of deeds that issues said marriage license, at least three days before the date applicants desire said marriage license shall be issued, and that said application may not be presented to one recorder of deeds and another recorder of deeds issue the marriage license.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

PENSIONS: Necessary that recipients of old age assistance
continue to be residents of the state in order
SOCIAL SECURITY: to qualify.

FILED

15

April 2, 1948

H-6

Mr. Proctor N. Carter, Director
Division of Welfare
Department of Public Health and Welfare
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion, which reads:

"Several confusing situations have developed regarding residence of Old Age Assistance applicants or recipients upon which we would like to have the advice of your Department.

"Section 9407, R.S. Mo. 1939 as it relates to residence qualifications for Old Age Assistance reads in part as follows:

"Pensions or old age assistance shall be granted under this law to any person who:***

"(3) has resided in the State for five years or more within the nine years immediately preceding application for assistance and for the one year next preceding the date of application for assistance." (Emphasis Ours).

"The title to the 1937 Social Security Act, Laws of Missouri, 1937, p. 467, reads in part as follows:

"AN ACT to repeal Sections 1 to 30 inclusive of an Act of the Fifty-eighth General Assembly of Missouri, found on pages 308 to 315 inclusive, Laws of Missouri, 1935, providing for assistance for residents of the state over the age of

seventy years under certain conditions and requirements* * *. (Emphasis Ours).

"Section 9412, R. S. Mo. 1939, provides for reconsideration of a recipient's case and for changing or cancelling benefits previously granted. Also Section 9411 provides for appeals to the circuit court of the county in which the applicant resides.

"We are familiar with the fact that the words 'reside', 'resided' and 'residents' are elastic words and have been interpreted by our courts in the light, purpose and context of the statute in which such terms are employed. It has been our construction of the Social Security laws that its purpose was to provide assistance for 'residents of the state' and when it is determined that a recipient has abandoned his Missouri residence he is ineligible to continue to receive benefits. In other words, we have construed the statute to mean actual as distinguished from a legal or constructive residence. This, of course, would not affect a recipient who is temporarily absent from the state who has a bona fide intention to return when the purpose of his absence has been accomplished.

"In view of the above and foregoing, and the fact that the State Social Security Law does not contain any specific provision for removing a recipient of Old Age Assistance, after original residence eligibility has been once established, from the rolls when residence in this state is abandoned, I would appreciate receiving from you an opinion as to whether or not we are legally correct in our construction of the intent of the law. I would also appreciate receiving from you an opinion as to whether or not the persons in the following hypothetical cases are entitled to receive Old Age Assistance under the residence requirements of the State Social Security Law.

"(1) Mr. A. has lived in Missouri many years and several years ago applied for Old Age Assistance. He was found eligible in all respects and placed on the rolls.

Two years ago he went to live with a daughter in California because she could give him a home and care. He intends to remain there permanently or indefinitely.

"(2) Mr. X. has lived in Missouri for about 50 years and was placed on the Old Age Assistance rolls upon attaining the age of 65. About 2 years ago he went to Florida to visit a son intending to return to Missouri after the visit. While there he found he liked the climate and has decided to remain.

"(3) Mr. Y., eligible for and duly enrolled upon the Old Age Assistance rolls, went to Arizona upon the advice of his physician. He intends to return to Missouri if his health permits.

"(4) Mrs. Z., eligible for and duly enrolled upon the Old Age Assistance rolls, lives with her four children who live in Texas, Arkansas, Ohio, and New York. She stays about an equal amount of time with each child. She has sold all property she formerly owned in Missouri and has stated that she cannot live by herself in Missouri as she is physically unable to perform her household work.

"(5) Mr. B., eligible for and duly enrolled upon the Old Age Assistance rolls, went to visit his son in Washington about 1 year ago. Recently he suffered a heart attack and now states he is unable to return to Missouri as he cannot travel alone.

"(6) Mr. C., eligible for and duly enrolled upon the Old Age Assistance rolls, afterwards went to Utah after a criminal indictment had been filed against him in Jasper County. He now states that due to his age and physical condition he is unable to return to Missouri."

In passing on such matters, it is well to keep in mind several well established rules of statutory construction which are applicable in the instant case. One is that statutes are to be construed, if possible, so as to harmonize and give effect to all of their provisions, which requires that in determining meaning of particular sections of an act all other parts should be considered. See *State ex rel. Cairo Bridge Commission v. Mitchell*, 181 S.W. (2d) 496, 352 Mo. 1136. Another well established rule is that the purpose of all statutory construction is to give effect to the Legislature's intention within the expression of the statute, and hence no rule of strict construction which will defeat a statute's purpose can be applied to its bare language. See *Thompson v. Glover*, 94 Fed. (2d) 544. Also, *State ex rel. Webster Groves Sanitary Sewer District v. Smith*, 115 S.W. (2d) 816, 342 Mo. 365. Another very important rule which may be in point is that, when a statute is ambiguous, the title may be examined to ascertain the act's meaning. See *In re Graves*, 30 S.W. (2d) 149, 325 Mo. 888. It was held in the case of *A. J. Meyer & Co. v. Unemployment Compensation Commission*, 152 S.W. (2d) 184, 348 Mo. 147, that, under the Constitution, title of a statute is necessarily a part thereof and is to be considered in the construction.

The Social Security Act of this state provides that a person must have resided in the state five years, or more, within the nine years immediately preceding application for assistance and for one year next preceding the date of application in order to qualify for old age assistance. Section 9407, R.S. Mo. 1939, reads in part:

"Pensions or old age assistance shall be granted under this law to any person who:

* * * * *

"(3) has resided in the State for five years or more within the nine years immediately preceding application for assistance and for the one year next preceding the date of application for assistance."

The foregoing statute requires one to be a resident of this state in order to qualify for such assistance, however, no place in the act does it specifically state what shall happen if recipients, upon being placed upon the roll, leave the state or abandon this state as their residence, or what

shall amount to an abandonment. Therefore, it will require a construction of the whole act to determine the legislative intent about such matters.

Section 9412, R.S. Mo. 1939, requires a reconsideration of all benefits granted as often as the administrator deems it necessary. Furthermore, if the writer is not mistaken, the Federal Social Security Board requires a reconsideration, by the state agency of every case receiving old age assistance, every six months, which is one of the prerequisites for obtaining Federal assistance in the payment of old age assistance grants.

Under Section 9411, R.S. Mo. 1939, any applicant aggrieved by the action of the State Commission by the denial of benefits in passing upon the appeal to the State Commission may appeal to the circuit court of the county in which such applicant resides. The constitutional amendment authorizing the payments of grants to the aged in this state did not in any manner restrict the payment of said grants to residents of this state. It merely grants the Legislature the privilege of enacting legislation for the payment of old age assistance. Section 38(a), Article III, Constitution of 1945, reads in part:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, * * * *"

To say the least, the State Social Security Act is ambiguous as to the necessity of a recipient of old age assistance retaining a residence in this state in order to continue to qualify for such assistance. Therefore, we shall examine the title to the Social Security Act. We find the original State Social Security Act, passed by the 58th General Assembly, provided for grants to needy aged, page 308, Laws of Missouri 1935. The title to said act, in part, reads:

"AN ACT to provide for, regulate and fix the conditions and requirements for assistance for residents of the State over the age of 70 years; * * * *"

The 59th General Assembly of the State of Missouri repealed the foregoing State Social Security Act and enacted in lieu thereof a new act, page 467, Laws of Missouri 1937, which act has practically the same qualifications as to the length of time one must reside in this state in order to qualify for assistance as was contained in the act it repealed, with the exception the new act no longer requires one to be a citizen of the United States.

It is reasonable to believe that, since every state in the Union now has provided for grants to the aged, and in view of the fact one must have resided in this state a specified period of time before qualifying for assistance, it was apparently the legislative intent that only those persons who can qualify as residents of Missouri are entitled to benefits under the act.

Therefore, in view of the foregoing statutory provisions relative to residential qualifications for certain persons under the act and rules of statutory construction invoked, we must conclude that the General Assembly in enacting the State Social Security Act only contemplated that residents of this state shall be entitled to receive assistance under the act, and when said recipients no longer are residents of this state they are disqualified to receive further assistance under the act.

Just when a person, who has once resided in this state a sufficient length of time to qualify for a grant under the State Social Security program, shall be considered no longer a resident of this state and disqualified to receive further grants is very difficult to determine. "Residence" is a very flexible term and has no fixed meaning applicable alike to all cases. This department has heretofore rendered a very comprehensive opinion defining the words "reside" and "residence" as used in the State Social Security Act. That opinion was rendered to Colonel Allen M. Thompson, the then Commissioner of the Old Age Assistance Division of this state, under date of September 28, 1935, a copy of which you have in your file. Therefore, for the purpose of this opinion, we deem it unnecessary to dwell at any great length on such definitions, but merely refer you to that opinion.

We have carefully searched the decisions in this and other states for a specific definition of "reside" or "residence," as it applies to laws pertaining to grants for old age assistance,

but regret to say that we have been unable to find wherein any court has ever been called upon to construe same. The Legislature has defined "residence" in Section 655, R.S. Mo. 1939, as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: * * * the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively; * * *"

54 C.J., Sections 1 and 4, pages 702 and 703, in part, lay down the general and accepted rule as to the elasticity of the word "reside," and hold that, while the word may occasionally be construed to mean a temporary place, it ordinarily means permanent residence. Said provisions read, in part, as follows:

"A. In General. An elastic words, often defined and construed by the courts, it is employed in a wide variety of significations, and its meaning has been variously shaded according to the variant conditions of its application, for it is capable of different meanings, and may receive a different meaning according to the connection in which it is found. * *

* * * * *

"D. Continuity and Permanency. While it is said that the word may signify a temporary abiding, the word in its ordinary sense carries with it the idea of permanence, as well as continuity, and embraces the idea of fixed or permanent residence, to be construed as excluding the mere casual presence of a transient, and implying a permanent abode as contradistinguished from a mere temporary locality of existence. Furthermore it imports a habitation of some degree of permanency, coupled with the home thought."

As stated by the court in *Greene et al. v. Beckwith*, 38 Mo. l.c. 387:

"* * * A mere residence of a temporary nature is not enough to constitute a man a resident of this State. It has been said that inhabitancy or residence does not mean precisely the same thing as domicil, but that they mean a fixed and permanent abode, or dwelling place for the time being, as contra-distin-
guished from a mere temporary locality of existence--*Matter of Wrigley*, 4 Wend. 602; S. C. 8 Wend. 134. * * * "

(See also *Reger v. Reger*, 293 S.W. l.c. 420.)

While intention to retain this state as one's residence has great weight, the courts have held that this may be overcome by actual facts and manifest appearances. In *re Lankford's Estate*, 197 S.W. 147, l.c. 148, the court said:

"Residence is largely a matter of intention. *Lankford v. Gebhart*, 130 Mo. 621, 32 S.W. 1127, 51 Am. St. Rep. 585. This intention is to be deduced from the acts and utterances of the person whose residence is in issue. * * * "

(See *State ex rel. Blackburn v. Smith*, 64 Mo. App. 313, l.c. 320.)

Therefore, in view of the foregoing, we are of the opinion that one's residence is the place where the family of any person shall permanently reside in this state, or if he has no family, where he shall generally lodge; that a continuity of a residence is not broken by mere temporary absence with intent of returning, or without a definite intention of abandoning such residence. That if he leaves his residence and while absent forms the intent of not returning, the continuity of his residence is broken as though he had formed the intent at the time of removing. One merely away on a visit or for one's health for a reasonable length of time, possibly several months or, in some cases, possibly longer, depending upon the circumstances, should not be disqualified for receiving old age assistance under the State Social Security Act. However, this is a matter within the discretion of the Director and Commission, and he should exercise such discretion

Mr. Proctor N. Carter

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under the particular facts in each case, since in all probability there will be no two identical cases.

CONCLUSION

Having reached the foregoing conclusion, we will now answer your questions in the order requested. It is our opinion that your questions Nos. 1, 2, 4 and 6 should be answered in the negative. No. 3 should be answered in the affirmative. No. 5 should be answered in the negative, unless there is a possibility that the recipient may improve to such an extent that he intends to and will return to this state.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARR:LR

COUNTY HIGHWAY COMMISSION:

The terms of members of County Highway Commission begin on the date of the appointment of the original commission by the county court, and thereafter, one commissioner should be appointed each year for a four-year term beginning on that date.

February 2, 1948

Honorable Frank Collier
Prosecuting Attorney
Wright County
Mountain Grove, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"As prosecuting attorney of Wright County, I request the following opinion of your department:

"The county court in the year 1927, after the enactment of what is now Section 8503, R.S., 1939, appointed a County Highway Commission, in conformity with the statute, namely one commissioner for a term of one year, one of a term of two years, one for a term of three years, and one for a term of four years, as well as complying with the requirements as to residence in proper districts and political affiliations. This commission organized, as required and entered upon the duties of their office. Since that time the commission has functioned, with original as well as other appointees.

"Through some manner, since the original appointments, the statute has been disregarded, overlooked or something, in that they did not continue to appoint a member each year for a four year term. The result now is that the commissioners have lately been appointed for terms of four years each, but two appointed

Honorable Frank Collier

each year, and these two appointed one year apart. In other words, two members terms expired in the fall of 1947, and according to the terms the other two members terms will expire in May of 1948.

"It is apparent that the statute has not been complied with, but the thought is, how can the matter be straightened out to enable the court to appoint one member each year as provided by the statute in the future."

The creation of county highway commissions was provided by an act of the General Assembly of the State of Missouri, which became effective July 3, 1927. Laws of 1927, page 421, Section 8502, R.S. Mo. 1939. Section 2 of that act, Section 8503, R.S. Mo. 1939, contained the following provision:

"* * * Not more than two of said commissioners shall be appointed from the same county court district, and not more than two thereof shall be affiliated with the same political party. No person shall be eligible to appointment as a member of the county highway commission who shall not have attained the age of twenty-five years, and who at time of his appointment is not a bona fide resident of county wherein appointed, and possessed of a knowledge of the interest of said county, and a known supporter and advocate of a system of county highways, constructed and maintained with a view to affording the greatest convenience to the greatest number of inhabitants of the county in the matter of farm-to-market roads. Within ten days after their appointment the members of such county highway commission shall meet at the county seats and organize by the election of one of their number as president, and another as secretary, of said commission."

Inasmuch as the statute fixed no date for the commencement or termination of the terms of the commissioners, those dates became fixed by the date of the appointment of the original commission. State ex rel. Rosenthal v. Smiley, 304 Mo. 549, l.c. 558, 263 S.W. 825. Thereafter, the County Court should have appointed, as of the same date of the original appointment, in each succeeding year, one person for a term of four years.

Honorable Frank Collier

The purpose of the legislation, in providing varying terms for the first commission, was to prevent the entire commission's going out of office at one time. In such circumstances, a person appointed to fill a vacancy would serve only until the end of the term of the member whom he succeeded. The same would be true of a person appointed to succeed a member whose term had expired, but who was holding over because his successor had not been appointed. In such instance, a new appointee would serve for a period of four years from the date of the expiration of the term of the person whom he succeeded, not four years from the date of appointment. Heyward v. Long, 178 S.C. 351, 182 S.E. 145, 114 A.L.R. 1130; 43 Am. Jur. 18.

Applying these principles to the situation in your county in order to correct the method of appointment to conform with the statute, the date of the appointment of the original commission should be ascertained, as well as the terms for which each of the original commissioners was appointed, then, by tracing which of the original commissioners each of the present commissioners has succeeded, the proper date of expiration of the terms of the present members of the commission can be ascertained and all future appointments should be made on the basis of the terms so established. If the court has purported to appoint a commissioner for a four-year term which would expire later than the date at which his term would have expired had all previous appointments been made in accordance with law, the term should be regarded as ended at such earlier date and a new appointment for a term of four years made at such time.

CONCLUSION

The terms of members of County Highway Commission begin on the date of the appointment of the original commission by the county court, and thereafter, one commissioner should be appointed each year for a four-year term beginning on that date.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURT: Magistrate cannot require deposit for costs in all civil proceedings.



February 11, 1948

2/17

Honorable J. A. Combs
Judge of the Magistrate Court
Madison County
Fredericktown, Missouri

Dear Judge Combs:

This is in reply to your letter of recent date requesting an opinion from this department on the following set of facts:

"During the past year we have found that, in civil cases filed in the Magistrate Court, it is sometimes very difficult to collect fees due the Sheriff when the Magistrate filing fee of \$5.00 only is paid by the plaintiff at the beginning of a suit. We are wondering whether it would be lawful and proper for a Magistrate Judge to rule in his court that the sum of \$10.00 be deposited by the plaintiff at the beginning of every civil suit, to cover both the filing fee and the Sheriff's fees, any amount remaining above these initial costs to be returned to the plaintiff by the clerk of the Magistrate Court."

The question presented is, in effect, whether the judge of the magistrate court can make a ruling of court requiring the plaintiff to make a cash deposit at the time of filing a civil proceeding in the magistrate court in a sum sufficient to cover the anticipated court costs.

At the outset, it will be well to point out that courts have an inherent power to prescribe rules of practice to regulate their proceedings in the administration of justice. Such rules of court must be adhered to both by the parties litigant and the court, in all cases which fall within them, so long as

they remain in force. State ex rel. Brockman Mfg. Co. v. Miller, 241 S.W. 920; Brooks v. Boswell, 34 Mo. 474; State ex rel. Pedigo v. Robertson, 181 S.W. 987. However, such rules must be reasonable and in harmony with the law. A rule which conflicts with or stretches a statute does not legalize any action under it and should not be enforced so far as it contradicts or goes beyond the statute. In the case of National Refrigerator Co. v. Southwest Missouri Light Company, 231 S.W. 930, the court said at page 934:

" * * * Of course, the law must be followed regardless of the rule; in other words, the rule cannot repeal the provisions of the statute regarding any matter. For instance, the statutes specify what matters shall be preserved by the record proper, and what matters must be preserved by bill of exceptions, which statutes must be complied with regardless of the rule. If a matter required by the statute to be preserved in the record proper should, as a matter of fact, be preserved in the bill of exceptions only, or vice versa, that error would not be cured by the rule, and the opposite party could by his motion call the attention of the court to the fact that the matter was not in fact properly preserved in the proper legal container. * * *"

See also State v. Cockrell, 217 S.W. 524; Colhoun et al. v. Crawford, et al., 50 Mo. 458; Purcell v. Hannibal & St. Joseph Railroad Co., 50 Mo. 504; State ex rel. Brockman Mfg. Co. v. Miller, supra.

The Laws of Missouri of 1947, Volume 2, page 240, Section 23, provide that a fee of \$5.00 shall be allowed the magistrate in each civil proceeding instituted in his court. By certain express exceptions, said fee must be paid by the plaintiff upon the commencement of any such proceedings and will be charged against the losing party, the same to be repaid to the plaintiff if he is successful. This deposit of the amount of the magistrate fee is the only such deposit provided for in the magistrate law and is not actually a deposit for costs as contemplated by the question under consideration.

With regard to deposits for costs, we direct your attention to Section 1402, R.S. Mo. 1939, which allows the court to require deposits for costs under certain circumstances. Said section reads as follows:

"If, at any time after the commencement of any suit by a resident of this state, he shall become non-resident, or in any case the court shall be satisfied that any plaintiff is unable to pay the costs of suit, or that he is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, rule the plaintiff, on or before the day in such rule named, to give security for the payment of the costs in such suit; and if such plaintiff shall fail, on or before the day in such rule named, to file the undertaking of some responsible person, being a resident of this state, whereby he shall bind himself to pay all costs which have accrued or may accrue in such action, or deposit with the clerk of the court in which said suit is pending a sum of money sufficient to pay all costs that have accrued or will probably accrue in the case, subject to be increased at any time whenever the court may deem proper and by its order require, the court may, on motion, dismiss the suit unless such undertaking shall be filed or sum of money be deposited before the motion is determined."

The above section provides that if in any civil case the court believes the plaintiff is unable to pay the cost of the suit, or is so unsettled as to endanger the officers of the court with respect to their legal demands, the court shall, on motion of the defendant or any officer of the court, require the plaintiff to either file the undertaking of some person who will bind himself to pay all costs or deposit with the clerk of the court a sum of money sufficient to pay all costs which have accrued or which may accrue in such action. We believe that this statute, in expressly setting out the circumstances under which deposits for costs may be required

Honorable J. A. Combs

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and the procedure which the court must follow in so requiring such deposits for costs, is restrictive. It will be well to point out that deposits for costs are statutory in nature. Under the authority of the above-cited cases the court may not prescribe a rule of court which will exceed or conflict with the terms of this statute, that is to say, a rule which will permit the court to require deposits for costs in every civil proceeding filed in the magistrate court.

Conclusion.


In the premises, it is the opinion of this department that the judge of the magistrate court may not prescribe a rule of court which will require deposits for costs in every civil proceeding instituted in the magistrate court.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

DD:ml

APPROVED:

J. E. TAYLOR 
Attorney General

MAGISTRATE COURTS: Magistrate can solemnize marriages in
MARRIAGE: his county alone except under certain
conditions.

April 9, 1948

FILED

18

Honorable Joseph P. Collins
Associate Chief Magistrate
Civil Courts Building
St. Louis, Missouri

Dear Judge Collins:

This is in reply to your letter of recent date, requesting the opinion of this department regarding the question of whether or not a magistrate has the authority to solemnize marriages in counties other than the one in which he is elected or appointed.

Section 3363, Laws of Missouri, 1945, page 1145, authorizing certain officials to solemnize marriages, provides:

"Marriages may be solemnized by any licensed or ordained preacher of the gospel, who is a citizen of the United States, or who is a resident of this state and a pastor of any church in this state, or by any judge of a court of record, except judges of the probate court."

Of course, magistrate courts being courts of record (Laws of Missouri, 1947, Volume I, page 240, Section 19), it necessarily follows that a magistrate is included in the application of Section 3363 as a judge of a court of record and as such is authorized to solemnize marriages. It has been so held by this department. However, Section 3363 makes no provision concerning the territorial jurisdiction of said judges in performing such services. Further, no such provision is found in the general laws relating to magistrate courts.

Magistrates are elected or appointed within and for a particular county. The official acts of a magistrate, in order to be valid, must be performed within the territorial boundaries of that county. He is not a magistrate in any other county.

In the case of State ex rel. Gardner v. Hall, 221 S.W. 708, 282 Mo. 425, the court held, at page 435:

"It is elementary that a court's power to hear and determine is limited to its territorial jurisdiction as defined by law. Beyond this its orders are nullities and its process is futile. (Works on Jurisprudence, p. 22.)"

See also Wagoner v. Wagoner, 229 S.W. 1064, 287 Mo. 567, l.c. 594, and State v. Aronson, 350 Mo. 309, 165 S.W. 404, l.c. 407.

It was held in the case of City of St. Louis v. Sommers, 148 Mo. 398, at page 401, as follows:

"The solemnization of a marriage is in no sense a judicial act. Were a justice to perform it in his court, no record or note could be made of it. It may be performed anywhere within his jurisdiction, at any and all hours of the night or on Sunday * * *" (Underscoring ours.)

Only in certain instances is a magistrate empowered to act in a county other than the one in which he was elected or appointed. If the magistrate in any county which has only one magistrate court is incapacitated and unable to act, or is absent from the county for a period of five days or more, the judge of the circuit court of such county may make an order appointing and designating some magistrate of another county within the circuit to act as judge of the magistrate court of such county until the regular magistrate resumes his duties (Laws of Missouri, 1945, page 765, Section 10a). This provision applies only when a temporary vacancy in the office of magistrate is created. When a permanent vacancy is created in such office, the Supreme Court of Missouri, in accordance with Article V, Section 6 of the Constitution of Missouri, is authorized to impose additional duties upon a magistrate and transfer such magistrate from one county to another until a regular magistrate is elected or appointed for that county.

Conclusion.

In view of the foregoing, it is the opinion of this department that a magistrate is authorized to solemnize marriages only within

Honorable Joseph P. Collins -3-

the county in which he was elected or appointed unless assigned to another county by the judge of the circuit court of such county or the Supreme Court of Missouri, as provided by law.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ml

SCHOOLS: District must pay tuition of high school students outside the district. Parents liable for tuition when.

FILED

18

September 13, 1948

9-27

Honorable Joe W. Collins
Prosecuting Attorney
Cedar County
Stockton, Missouri

Dear Mr. Collins:

This department is in receipt of your request for an official opinion which reads as follows:

"In the case of a rural district not having sufficient funds to pay the receiving high school district's tuition and transportation charges has the receiving high school district the legal right to look to the parents for the remainder of these funds and should the parent not accept this responsibility can the receiving high school district stop said students from further pursuing that years educational course.

"If the sending district is responsible for these tuition students attending high school and the board refuses to vote the necessary levy is there any means by which the sending district could be forced by the receiving high school district to pay this tuition."

At the outset, it is necessary to discuss the law and the cases applicable to the question of the payment of tuition of high school students who, because the school district in which they live does not maintain a high school, are forced to attend a high school outside of the district.

Section 10458, M.S.A., Laws of Missouri, 1945, page 1657, provides, in part, as follows:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; * * * ."

The effect of this part of the statute is tersely stated in the case of Linn Consol. High School Dist. No. 1 vs. Pointer's Creek Public School District, 203 S.W. (2d) 721, 1.c. 724:

"* * * Section 10458 requires such a district to pay the tuition of its children who have finished the grades and attend high school in another district. * * * ."

Section 10458 further provides that the rate of tuition that must be paid by the sending school district is to be the cost per pupil of maintaining the school attended less fifty dollars (\$50.00), which is paid by the state. The sending school district is liable for this payment from the funds of the district, and they must levy the entire constitutional amount, if necessary, in order to pay the costs of sending its high school students to another district or school. Section 11, Article X of the Constitution of Missouri, 1945, permits a school district to levy sixty-five (\$0.65) cents on the one hundred dollars (\$100.00) valuation without the approval of the voters of the district. Any greater amount must be voted on and approved at an election held for that purpose. In the Linn Consol. High School District case, cited above, the Linn County High School District sued the Pointer's Creek District for tuition of pupils residing in the Pointer's Creek District who had attended high school at Linn. The Court held that the Pointer's Creek District had the duty to pay for such tuition, and the

fact that the levy had not produced sufficient funds to pay the obligation was no defense if the maximum constitutional amount had not been levied. In view of the statute and the above case it will be seen that the duty of paying the tuition rests upon the sending school, and in order to pay off such obligation, the maximum constitutional amount must be levied, if necessary.

However, Section 10458 further provides:

"* * * but no school shall be required to admit any pupil, nor shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as hereinbefore provided. * * * ."

Under the above provision, the receiving school has the right to refuse to admit any pupil whose tuition has not been paid. At first reading it might appear that the receiving school is entitled to look to the pupils, parents or guardians for the tuition if the same is not paid by the sending school district. The section, however, goes on to state that:

"* * * In no case, however, shall the amount collected from a pupil, parent, or guardian exceed the difference between fifty dollars and the per pupil amount actually paid by the state, * * * ."

This section states that the amount that the pupil, parent or guardian is liable for, is the difference between fifty dollars (\$50.00) and the amount paid by the state. The purpose of this section is to hold the pupil, parent or guardian liable only if the amount received from the state did not total fifty dollars (\$50.00). The Legislature realized that in some years the state aid given to school districts who send their high school students outside the district might not amount to fifty dollars (\$50.00), and, therefore, provided in such case that the difference between the state aid and fifty dollars (\$50.00) must be paid by the pupil, parent or guardian. We can take judicial notice of the fact that since the passage of Section 10458 the state school fund revenue has been sufficient to pay the entire amount, and that the pupil, parent or guardian has never been

called upon to make up the difference. What was said in the Linn Consol. High School District case, supra, is not contrary to this view, because therein it was argued that: "* * * plaintiff can collect the tuition from the pupils or their parents or guardians, citing Section 10458, supra. * * * ." The Court did not pass upon this question but merely said that "The primary obligation is on the district. ", and did not discuss the liability of the pupil, parent or guardian.

Furthermore, if the sending school district has not levied the maximum constitutional amount then the receiving school district under authority of the Linn Consol. High School District case may obtain judgment against the sending school district for the tuition it owes upon the students residing within the district and who attend the high school district outside said district. After a judgment has been obtained then, as stated in the case of State ex rel. Wood vs. Hamilton et al., 136 S.W. (2d) 699, mandamus will lie to enforce the collection of an additional school levy for the payment of the judgment against the district. However, this procedure is open only if the sending school has not levied the maximum permitted by the Constitution. If the maximum has been levied, and the voters of the district refuse to vote an additional amount, then we know of no way that the district may be forced to provide the additional revenue to pay for the cost of maintaining said district, including the tuition of its high school students. Of course, the receiving school district may refuse to accept the high school students if the tuition is not paid.

CONCLUSION.

It is, therefore, the opinion of this department that: a school district which does not maintain a high school must pay the tuition of its children who have finished the grades and attend high school in another district. The pupil, parent or guardian is responsible for the payment of tuition only if the amount received from the state is less than fifty dollars (\$50.00), and such responsibility only extends to the difference between fifty dollars (\$50.00) and the amount received from the state.

Honorable Joe W. Collins -5-

It is further the opinion of this department that: a high school district who accepts students from another district which has not levied the maximum constitutional amount may sue the sending school district for the amount of the tuition, and after having obtained a judgment, mandamus the sending school district to levy the additional amount within the constitutional limit. If the sending school district has levied the maximum constitutional amount, and the voters of the sending district refuse to approve a larger levy then the receiving school district has no recourse against the sending school district, if said district is unable to pay, other than to refuse to admit the pupils from said sending district.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:lr

UNIVERSITY:

Matching of funds appropriated for construction of dormitories.

June 2, 1948



Mr. Leslie Cowan, Secretary
Board of Curators of the
University of Missouri,
Columbia, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Board of Curators of the University of Missouri at its meeting on May 14, 1948, directed that inquiry be made of you as to whether or not the procedure outlined below which the Board proposes to follow in its Dormitory and Student Union Building Program, complies with Section 9.230 of H. B. 445, passed by the 64th General Assembly, which appropriated the sum of \$2,465,000 for the construction of dormitories, dining, and/or recreational facilities on the University grounds at Columbia, and which included a provision that this sum be matched by an equal amount to be provided by the University from sources other than State Appropriations. Section 7.084 of H. B. 453, also passed by the 64th General Assembly, contains provisions identical with those found in Section 9.230 of H. B. 445.

"The Board of Curators proposes to meet the matching requirements of these appropriation acts by the issuance of revenue bonds and by the use of funds in its possession, other than state appropriated moneys.

"I am enclosing a copy of the Resolution of the Board of Curators adopted at its meeting on June 4, 1947, regarding the use of funds of the University of Missouri, other than state

Mr. Leslie Cowan

appropriated moneys, to be used in the financing of the Dormitory, Dining, and/or Recreational Facilities Construction Program. The University funds referred to in the enclosed resolution are to be used in matching state appropriated moneys as provided in the sections of House Bills 445 and 453 referred to above. The exact amount of the bond issue, depending on costs, may be different from the amount of the bond issue mentioned in the resolution but the procedure will be the same as outlined in the resolution.

"Will you please advise me as to whether or not these University funds, if used in the manner outlined in the enclosed resolution, will be regarded as 'matching funds', under the terms of the sections of House Bills 445 and 453 referred to above?

"The Board of Curators will appreciate having your opinion in this matter at your earliest convenience."

Section 9.230 of House Bill 445, 64th General Assembly (Laws 1947, p. 183) appropriated the sums of \$2,456,000 and \$262,500 for the purpose of building or purchasing or reconstructing buildings for dormitories at the University of Missouri and the School of Mines and Metallurgy respectively. Included in the aforesaid act is the following:

"Provided, however, that any funds appropriated under this section shall be expended under the supervision of the administrative boards of the institutions to which the money is appropriated, and such funds shall not be expended unless equally matched by funds provided for by the issuance of revenue bonds by the respective institutions or funds, other than state appropriated moneys, supplied by the respective institutions or from federal grants made to them for such purposes; and provided further, that the cost of any dormitory now under construction or which may be purchased or reconstructed which shall provide a part of the program under the provisions of this section shall be considered as matching funds as required in this section; * * *."

Mr. Leslie Cowan

The resolution which you submitted to us, and which was adopted by the Board of Curators on June 4, 1947, contemplates the construction at the University of Missouri of men's and women's dormitories, and the Student Union Building at an estimated cost of \$6,700,000. The resolution recites that revenue bonds in the amount of \$2,235,000 are expected to be issued to provide, in part, matching funds under House Bill 445. In addition, the sum of \$2,000,000 "now held by or due to the University from sources other than state appropriations" is by the resolution set aside to be used in matching the funds appropriated by House Bill 445.

The resolution pertaining to the School of Mines recites that \$300,000 is held by or due to the Board from sources other than state appropriations, and that the issuance of revenue bonds in the amount of \$200,000 is contemplated. It then provides that the aforementioned sum of \$300,000 be set aside as matching funds under House Bill 445.

The minutes do not reveal the source of the sums of \$2,000,000 and \$300,000 to be set aside as matching funds by the University and the School of Mines, except to state that they are from sources other than state appropriations. The minutes do state that the funds had been held in the general maintenance budgets of the respective schools, and that the University's attorney had rendered an opinion to the effect that the Board of Curators had the authority to use such funds for the construction of facilities for students.

Not having seen that opinion, and not knowing the source of the funds in question, other than that they are not state appropriated funds, we are not here passing upon the question of the availability of such funds, but are assuming, for the purposes of this opinion, that they are funds which the Board may use for the purposes in question.

Section 9.230 of House Bill 445 requires that the funds appropriated be equally matched by the proceeds of the revenue bonds or funds other than state appropriated moneys supplied by the respective institutions, or from federal grants made for such purposes. The object of this provision is obvious and its meaning clear, we believe. The sum of \$2,465,000 has been appropriated for the University. A fund of \$2,000,000 has been set aside by the resolution, and upon the issuance and sale of the revenue bonds contemplated by the resolution, the sum of \$4,235,000 will be available, which will more than equal the sum appropriated and required to be matched. For the School of Mines the sum of \$262,500 was appropriated. A sum of \$300,000 has been set aside, and upon the issuance and sale of revenue bonds a total of \$500,000 will be available, which likewise will more than equal the sum appropriated and required to be matched.

Mr. Leslie Cowan

The authority of the Board of Curators to issue revenue bonds for the purposes here involved was established in the case of State ex rel. Curators of the University of Missouri v. McReynolds, 193 S.W. (2d) 611. This authority has now been expressly provided by statute. Laws 1945, p. 1715. The sums of \$2,000,000 and \$300,000, set aside by the resolution submitted, matched the sole requirement of Section 9.230 of House Bill 445, that they be funds other than state appropriated moneys.

CONCLUSION

Therefore, we are of the opinion that, upon the setting aside of the sums referred to in the resolution of the Board of Curators, adopted at the meeting of June 4, 1947, and upon the issuance and sale of the revenue bonds referred to therein, the Board of Curators will have "equally matched" the sums appropriated by Section 9.230 of House Bill 445, 64th General Assembly, for the use of the University of Missouri and the School of Mines and Metallurgy for the construction of dormitory facilities.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

METROPOLITAN AREA

PLANNING COMMISSION: Method of procedure in creating obligations and paying expenses.

September 2, 1948

FILED

19

Honorable Bert Cooper, Director
Department of Business & Administration
State Office Building
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Governor Donnelly has, by executive order, assigned the Commission created by the 64th General Assembly under H. B. 423.

"Would you please give me your interpretation of Section 4, page 3, lines 10 to 12 inclusive of H. B. 423, with reference to the following questions:

"1. Is the restriction in the clause constitutional and binding?

"2. If the answer to question one is in the affirmative, would the law be complied with when Illinois appropriates a like amount or a greater amount to that of Missouri and makes it available to the joint commission?

"3. If the answer to question two is in the affirmative would the same plan apply to the expenditure of the Missouri appropriation that now applies to other divisions in the department?

"4. If the Answer to question two is negative could the amount of the Missouri appropriation be expended for items specified in the law in accordance with plans now applying to other divisions and adjustments be made by, and between, the Comptrollers of the two states, Illinois and Missouri, at the end of the fiscal year?

"5. Can the Illinois Commission or the Missouri Commission act independently and

incur financial obligations or must they work jointly for such obligation to be valid?

"6. Would the law expressed in section 4 and laws expressed elsewhere in Missouri statutes be complied with by each state assuming and paying for one half of each financial obligation incurred by the commissions working jointly? i.e.: each bill would be split equally and two requisitions made, one for one half the amount to Missouri and the other half to Illinois?

"7. Will you please suggest one or more plans by which the law specified above may be best complied with under the Missouri Constitution and Missouri Statutes?"

House Bill No. 423 of the 64th General Assembly, referred to in your letter of inquiry, provides for the appointment of a metropolitan area planning commission to cooperate with a similar commission created by the General Assembly of Illinois. Such joint commission has been enjoined with the duty of preparing a comprehensive plan of organization and administration for the planning and development of the area embracing the City of St. Louis, East St. Louis, Illinois, and neighboring counties and municipalities. We are further informed that the 64th General Assembly of the State of Missouri has appropriated the sum of \$25,000.00 for the carrying out of such duties by the Missouri commission, and that a like sum has been appropriated by the General Assembly of the State of Illinois.

In this opinion, we have assigned numbers to the various phases thereof to conform with the numbering accorded in your request.

1.

Lines 10 to 12 of Section 4 of House Bill No. 423 of the 64th General Assembly read as follows:

" * * * but in no event shall the expenditures by the Missouri commission exceed the amount of expenditures by the commission of Illinois."

In the fiscal management of the state, the General Assembly is supreme, barring constitutional prohibitions.

The General Assembly has seen fit to impose the limitation upon the expenditures to be made by the commission to an amount equal to such expenditures made by the Illinois commission. We do not find any constitutional provisions that would serve to invalidate such action by the General Assembly. We, therefore, consider the restriction constitutional and binding upon the Missouri commission.

2.

We note that the General Assembly of Missouri has employed the word "expenditures" in the limiting clause. This word, in its plain and ordinary meaning, refers to disbursements or actual payments or the outlay of money. The word "appropriation" has a distinctly different definition. Reading the entire Section 4 of the act, it is apparent that the General Assembly has specifically limited the outlay to be made by the Missouri commission to the amount similarly expended by the Illinois commission.

We, therefore, consider that the mere appropriation by the General Assembly of the State of Illinois of an amount equal to that appropriated by the General Assembly of the State of Missouri would not be in compliance with this restriction, nor authorize the Missouri commission to spend all of its appropriation.

3.

Question No. 2 having been answered in the negative, no inquiry remains to be answered under paragraph 3.

4.

We presume by this question you wish to be advised as to whether the Missouri commission may make use of plans previously formulated by other divisions of your department, and then if financial adjustments could thereafter be made by the Comptrollers of Illinois and Missouri at the end of the fiscal year.

We do not believe that the Missouri commission, as established under House Bill No. 423, could delegate to some

other state agency the duty of preparing the plans for the preparation of which such commission has been specifically created. In accordance with elementary rules of law, powers vested in the state agency may not be delegated in the absence of specific authorization or through implied necessity. Considering the act creating the Missouri commission in its entirety, the purposes for which created, the power given to the commission to employ necessary administrative and technical services and the appropriation made by the General Assembly to discharge such obligations so incurred, it seems the clear intent to be that the Missouri commission personally, and through its own consulting employees, do and perform the duties enjoined upon such commission.

5.

Section 2 of the act reads as follows:

"The commissioners so appointed, in co-operation with commissioners or representatives lawfully designated by the State of Illinois, shall:

"(a) Prepare a plan of organization and administration whereby the affected communities of the area may most effectively plan and guide the development of the area in matters which are of concern to the area as a whole.

"(b) Submit the plan so prepared to the Sixty-fifth General Assembly."

The quoted provision of the act seems to contemplate that the two state commissions shall jointly prepare the organization and administration plans for the area as a whole; however, we do not find anything in the act that would preclude the Missouri commission, acting independently in assembling the necessary data and making the necessary research, insofar as the duties of such commission affect the metropolitan area located within Missouri. In fact, Section 4 of the act, authorizing the employment of administrative and technical employees, tends to indicate that the Missouri commission may act independently in this regard. All obligations incurred, however, are subject to the restriction referred to in No. 1, supra.

Hon. Bert Cooper

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6.

We believe that the method outlined in paragraph 6 of your inquiry is the proper one to pursue in the incurring of obligations and their payment. It would be a strict compliance with the limitation upon the Missouri commission that its expenditures should not exceed those of the commission created by the General Assembly of the State of Illinois.

7.

We believe this paragraph of your inquiry to be answered by No. 6, supra.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

WFB:VLM

UNIVERSITY OF MISSOURI
PROPOSED VOCATIONAL
SCHOOL AT CAMP CROWDER

Proposed conveyance of real estate
from Federal Government to Board of
Curators of the University of Mis-
souri for use as site for vocational

school, restricting same to that use for twenty-five year period,
providing for semi-annual reports to War Assets Administration,
providing against sale of property within twenty-five years of
date of deed without consent of the United States, and providing
for reversion to the United States in the event of violation by
the Board of Curators of certain restrictions would convey abso-
lute fee simple title to the Board of Curators within the meaning
of "An Act to establish a Missouri State Vocational School", Laws
Mo. 1947, pp. 364-365.

December 3, 1948



Mr. Leslie Cowan
Vice-President and Secretary
University of Missouri
Columbia, Missouri

Dear Mr. Cowan:

This will acknowledge your recent letter in which you request
an opinion of this department. Your letter is as follows:

"The 64th General Assembly passed an act au-
thorizing the Board of Curators to acquire
certain facilities at Camp Crowder, Missouri
under certain definite conditions for the
operation of a state wide Vocational School.
We know this act as Senate Bill Number 282.
We have been negotiating for some time with
the officials of the War Assets Administra-
tion in Washington about the transfer of
this property to the University, and have
recently secured a copy of the deed that the
War Assets Administration is willing to give
the University. I am enclosing a copy of
this proposed deed and also a copy of a let-
ter from the General Counsel of the War As-
sets Administration, outlining the condi-
tions under which the transfer will be made.
The Board of Curators requests that you ex-
amine the proposed deed and inform it whether
or not, in your opinion, such deed and the

Mr. Leslie Cowan

procedure outlined in the General Counsel's letter will fulfill the requirements of the State law referred to above; thus, permitting the Board to accept title to the property."

You have also submitted for our information the letter from Mr. J. H. Joss, General Counsel to the War Assets Administration, in which he calls attention to the fact that it has been the policy of the War Assets Administration, firmly established and long adhered to, that in all disposals of property by that agency, the transferee must pay all external administrative expenses, including such items as cost of service, decontamination, inventorying and segregating personal property, etc. You have also submitted for our examination and consideration the form of deed submitted to you by the War Assets Administration which will hereinafter be set forth in part.

The question arising is whether or not a deed from the War Assets Administration to the Board of Curators, following the form submitted, would convey an absolute fee simple title to the real estate conveyed as required by Section 5 of an act establishing a Missouri Vocational School, Laws Mo. 1947, pp. 364-365.

Section 5 of the said act is as follows:

"This act shall take effect only in the event that the Board of Curators shall be able to acquire absolute fee simple title to the required property located at a site presently designated as Camp Crowder, Missouri, provided such title in fee simple shall be acquired not later than January 1, 1949, and without cost to the State of Missouri."

The relevant portion of the form of deed submitted by the War Assets Administration is as follows:

"WITNESSETH THAT:

"In consideration of the observance and performance by the _____ of the covenants, conditions, restrictions, and reservations, hereinafter set forth, and other good and valuable consideration, receipt of which is hereby acknowledged, the Government does by these presents remise, release and forever quit claim, subject to the covenant, conditions, restrictions and reservations hereinafter contained to the _____ and to its

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successors and assigns the following described property situated in the County of _____, State of Missouri, to-wit:

"DESCRIPTION

being (a part of) the same property acquired by the _____, the United States of America, _____ under

of record in

This conveyance is made and accepted upon each of the following conditions subsequent which shall be binding upon and enforceable against said party of the second part, its successors or assigns and each of them as follows:

FIRST: That for a period of 25 years from the date of this conveyance, said premises shall be continuously used as and for _____ (insert a short statement of proposed use) by _____ and for incidental purposes pertaining thereto but for no other purposes.

SECOND: That for a period of 25 years from the date of this conveyance, the party of the second part, its successors or assigns shall file semi-annual reports with the War Assets Administration or its successor in function, setting forth its curricula and other pertinent use for the purposes first above set forth.

THIRD: That it will not resell or lease said premises within 25 years from the date of this instrument without first obtaining the written authorization of the War Assets Administration to such resale or lease.

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That in the event there is a breach of any of the above conditions by the party of the second part, its successors or assigns, whether caused by the legal inability of said party of the second part, its successors or assigns, to perform said conditions, or otherwise, during said 25 year period, all right, title and interest in and to the said premises shall, at its option, revert to and become the property of the United States of America which shall have the immediate right of entry upon said premises and the party of the second part, its successors or assigns shall forfeit all right, title and interest in said premises and in any and all of the tenements, hereditaments and appurtenances thereunto belonging;

PROVIDED HOWEVER, that the failure of the War Assets Administration, or its successors in function to insist in any one or more instances upon complete performance of any of the foregoing conditions subsequent shall not be construed as a waiver or relinquishment of the future performance of such condition, but the party of the second part's obligation with respect to such future performance shall continue in full force and effect; PROVIDED FURTHER that in the event the United States of America fails to exercise its option to reenter the premises for any such breach within 26 years from the date hereof, all of the foregoing conditions subsequent, together with all rights of the United States of America, to reenter thereon as hereinabove provided shall as of that date terminate and be extinguished.

IN THE EVENT the party of the second part, during the 25 year period first above referred to, replaces the temporary structures and improvements on the demised premises at the date hereof with permanent structures and improvements to be used for the same purposes as set out in condition numbered FIRST above, it may make application to the War Assets Administration or its successor in function for, and the latter may, in its discretion, abrogate the conditions subsequent together with all rights of re-entry hereinabove contained.

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The party of the second part may, during the said 25 year period, secure abrogation of the conditions subsequent together with all rights of re-entry hereinabove contained, by:

- a) Payment of the unamortized portion of the 100% public benefit allowance granted the party of the second part from the current market value of _____; which amortization shall be at the rate of 4% for each completed 12 months of operation in accordance with the terms of transfer; and
- b) Approval of the War Assets Administration, or its successor in function.

The party of the second part, by the acceptance of this deed, covenants and agrees, for itself, its successors and assigns that the United States of America shall have the right during the existence of any national emergency declared by the President of the United States of America or the Congress thereof, to the full unrestricted possession, control and use of the premises or any part thereof, including any additions or improvements thereto made subsequent to this conveyance, without charge EXCEPT THAT the United States of America shall be responsible during the period of such use, if occurring prior to _____ (insert date 25 years from date of deed), for the entire cost of maintaining the premises or any portion thereof so used and shall pay a fair rental for the use of any installations or structures which have been added thereto without federal aid; PROVIDED HOWEVER, that if such use is required after _____ (insert date 25 years from date of deed) or the party of the second part, its successors or assigns has secured the abrogation of the conditions subsequent together with all rights of re-entry as hereinabove provided, the United States of America shall pay a fair rental for the entire portion of the premises so used."

It appears to us that a properly executed deed, following the form submitted, would convey an absolute fee simple title to

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the Board of Curators within the meaning of the Missouri statute above quoted. It is our opinion that the title conveyed thereby would be a fee simple title upon conditions subsequent. In so holding we have considered the question as to whether or not the numerous restrictions contained in the contemplated deed constitute such limitations as are repugnant to an estate in fee simple.

We believe that the distinction to be drawn in considering this question is the distinction between limitations and conditions. The difference between a condition and a limitation is that a condition prescribed by a grant or devise does not defeat the estate when broken, unless it is avoided by the act of the grantor; whereas, a limitation marks the period which is to determine the estate without entry or claim by the grantor. (Smith v. White, 5 Nev. 405).

An examination of the form of deed above set forth reveals that the instrument provides that, upon the violation of certain named provisions thereof, the ownership of the land shall revert to the United States at the option of the United States. Said provision in said form of deed is as follows:

"That in the event there is a breach of any of the above conditions by the party of the second part, its successors or assigns, whether caused by the legal inability of the said party of the second part, its successors or assigns, to perform the conditions of otherwise during said 25 year period, all right, title and interest in and to the said premises shall, at its option, revert to and become the property of the United States of America, which shall have the immediate right of entry upon said premises, and the party of the second part, its successors or assigns, shall forfeit all right, title and interest in said premises and in any and all of the tenements, hereditaments and appurtenances thereunto belonging."

It should here be observed that under this provision, even in the event of the violation of said provisions or any of them, title does not automatically revert to the United States, but is reacquired by the United States only in the event that the said government sees fit to exercise its option to re-enter the land. Bearing the above-stated facts in mind, we now direct attention to the fact that the habendum clause of the deed is sufficient to grant a fee simple title to the Board of Curators if the covenants, conditions, restrictions and reservations to which such

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clause makes the conveyance subject are not repugnant to a fee simple title. In this connection we direct attention to the following quotation from said habendum clause:

"* * * The government does by these presents remise, release and forever quit claim, subject to the covenants, conditions, restrictions and reservations hereinafter contained to the _____ and its successors and assigns, the following described property situate in the County of _____, State of Missouri * * *."

We now point out that the use of the word "heirs" or other words of inheritance is not required in order to create a fee simple estate in Missouri, by reason of Section 3496, R.S.A. Mo. 1939, which so provides, nor is it necessary in a grant to a government, according to the provisions of the common law to use the word "heirs" or other words of inheritance. In this connection we quote Sec. 743, p. 435, Vol. 2 of Thomson on Real Property:

"The common law rule that the word 'heirs' or its equivalent was necessary in a deed in order to convey a fee, had no application when the grant was to the Crown. While the individual representing the sovereignty might change, the sovereign itself was immortal by perpetual succession; and, on principle, a life estate to an ideal being having a perpetual and uninterrupted existence must be co-extensive with a fee or perpetuity, and hence words of succession cannot extend it. So a deed to the government does not require words of succession or inheritance in order to pass a fee."

It is, of course, obvious that a deed to the Board of Curators of the Missouri State University is the equivalent of a deed to the State of Missouri. We, therefore, hold that the habendum clause of the form of deed submitted is sufficient to convey a fee simple title to the Board of Curators. Since this is true, we now come to the question as to whether the covenants, conditions, restrictions and reservations contained in the proposed deed are repugnant to the fee simple estate. We are of the opinion that such covenants, restrictions, conditions and reservations constitute only conditions subsequent, and that the title conveyed is a fee simple on conditions subsequent, since it is determinable in case of breach only at the option of the grantor and not by force of limitations fixed by the proposed deed.

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In this connection we must consider whether the 25 year restriction on alienation without the consent of the United States is repugnant to the fee simple title. Bearing on this question is the following pertinent quotation from Thompson on Real Property:

"An 'estate in fee simple' arises where one has an estate in lands or tenements to him, and his heirs forever, and such an estate is not inconsistent with a restriction on alienation". (Thompson on Real Property, Sec. 733, p. 427, Vol. 2.)

We now come to the question as to whether conditions subsequent generally are repugnant to the fee simple title. In this connection we quote as follows from Tiffany Real Property, Vol. 1, p. 308, Sec. 191:

"A condition subsequent may, be the common law authorities, be created on a transfer of a fee simple, * * it not being necessary that the transfer have a reversion in order to support the right of re-entry".

That this is the rule in Missouri is shown by the doctrine set forth in *Alexander v. Alexander*, 156 Mo. 413. In view of the very illuminating discussion of the immediate vesting of the fee simple estate, coupled with conditions subsequent, the breach of which may result in the divestiture of that title, we quote at length from the opinion of Judge Burgess in the last above-cited case. This was a case in which a father bequeathed a farm to his son and provided that the son should well and faithfully care for and support his mother as long as she should live. After the death of the testator, the son, not having supported his mother because she was amply provided for and did not need or request his support, predeceased his mother, and the son's heirs claimed that the will had vested a fee simple title in the son, descendable to them. This contention was sustained by the court. The following is quoted from the opinion:

"The conditions for the care and support of the devisee's mother 'as long as she shall live,' without charging the property with the performance of the conditions, 'would seem to be conditions subsequent, because of the implication that the devisee * * * was to have possession and control of the premises for the purpose of fulfilling the conditions.' (*Morse v. Hayden*, 82 Me. loc. cit. 229.)

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"In *Finlay v. King's Lessee*, 3 Pet. loc. cit. 374, Chief Justice MARSHALL announces the rule with respect to estates as conditions precedent and subsequent to be as follows: 'There are no technical appropriate words which always determine whether a devise be on a condition precedent or subsequent. The same words have been determined differently; and the question is always a question of intention. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends, must be performed, the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, if this is to be collected from the whole will, the condition is subsequent.' (*Burnett v. Strong*, 26 Miss. 116.)

"The conditions being subsequent, it must needs follow that the fee vested in the devisee immediately upon the death of the testator, and that the land descended to the plaintiff Florence on his death, subject to the rights of the devisee's widow therein under our statute, unless by reason of non-performance by him of the conditions of the will an estate to which he was previously entitled was divested. It should not, we think, be held that there was such a non-compliance with the conditions of the will during the lifetime of the devisee as to produce such a result, for the reason that his mother had a competency of her own, did not need support, but voluntarily supported the devisee and his family up to the time of his death, and never at any time requested him to care for and support her, and she must therefore be held to have waived the same as she unquestionably had the right to do.

"The conditions imposed upon the devisee to well and faithfully care for and support his mother, were of a personal character. That this was the view of the testator is clear from the provisions of the will, for if it had been otherwise, how easy it would have

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been for him to have provided in case of the death of the devisee before his mother, for her care and support by some other member of his family, or in the event of his failure to comply with the covenants that the land should go elsewhere.

"But he did not do this, and as by no act or omission of the devisee was his estate in the land divested during his lifetime, unless it was occasioned by his death, it then descended to his child, subject to the statutory rights of his wife, as before stated.

"In the case of *Burnham v. Burnham*, 79 Wis. 557, the testator by his will gave a certain sum to each of his children, and by a codicil thereto, declared that his son D. should not have nor receive any part, parcel, or interest in his estate, real or personal, unless within five years after the testator's decease, he should have reformed and become a sober and respectable citizen, of good moral character, and directed that if he did so reform, his executors should pay over to him one-half of the property bequeathed to him, and if he remained reformed for a further period of five years, pay over to him the other half thereof. D. died within eleven months after the death of his father. It was held that D.'s right in the estate vested in him immediately upon the death of his father, subject only to be divested by his failure to perform the conditions subsequent named in the codicil, which by his death were rendered impossible.

"In *Merrill v. Emery*, 10 Pick, 507, the testator gave to his wife one-half of all the money that he might leave in his house at the time of his death, together with all his family stores at that time on hand, upon the condition, that she would relinquish all her right to dower in his estate, and that she educate and bring up his granddaughter, M.L.R. The wife died seven days after the testator, without expressly waiving the provisions made for her in the will, or claiming dower. It

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was held, among other things, that the condition to educate the granddaughter was a condition subsequent, and that the legacy vested in the wife and the non-performance of this condition being occasioned by an act of providence, did not divest the legacy.

"In *Richards v. Merrill*, 13 Pick. 405, the same will was again before the same court for construction, and it was held, Chief Justice SHAW delivering the opinion of the court, that by the terms of the will the obligation imposed upon the testator's widow was one of parental care towards the granddaughter which died with the widow.

"Our conclusion is that the fee to the land vested in the devisee under the will immediately upon the death of the testator, that the conditions imposed upon the devisee by the will to 'well and faithfully care for and support his mother' were conditions subsequent, which were not broken by him during his lifetime, and from which he was absolved by death."

We here comment that the form of deed, submitted by the United States Government, here under consideration, as hereinbefore demonstrated, uses such language as would vest fee simple title in the grantee, and specifically provides that the conditions set forth therein are conditions subsequent. We are, therefore, of the opinion that under the doctrine of the opinion last above quoted, such a deed if executed would undoubtedly vest a fee simple title upon conditions subsequent in the Board of Curators, the grantee.

Since we have reached the conclusion that such a deed would convey a fee simple title on conditions subsequent to the grantee, we must now consider the question as to whether such fee simple title would be an absolute fee simple title within the meaning of the 1947 statute, supra. We advert to the fact that said statute contains a provision against its becoming effective unless the Board of Curators is able to acquire an absolute fee simple title to the land in question before January 1, 1949. We are of the opinion that a properly executed deed, following the form submitted, would convey to the grantee an absolute fee simple title within the meaning of said statute. We hold that since the title conveyed is a fee simple title, it is an absolute fee simple title because there is no distinction under the law between a fee, a fee simple and an absolute fee simple.

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In this connection we consider pertinent the following quotation from Thompson on Real Property, Vol. 2, p. 426, Sec. 733:

"* * * a fee simple estate is an estate of inheritance which is unconditional, indefeasible, and absolute, and which descends to the owner's heirs generally and not merely to a particular class of the owner's heirs as in the case of a fee tail. The word 'absolute' added does not impart anything to the legal effect of the term 'fee' or 'fee simple'".

The same truth is expressed in Jecko, Trustee of Hume et al. v. Taussig, 45 Mo. 167, in the following words:

"The deed authorizes a conveyance in 'fee'. Much stress is laid upon the distinction which is supposed to exist between an estate in 'fee' and an estate in 'fee simple absolute.' It is urged that a right to convey in 'fee' does not necessarily give the right to convey in 'fee simple absolute.' The distinction in question may have once existed and had practical force and importance in England. In this country, however, it is apprehended that such distinction has become dim and shadowy, at least in the general mind. The term 'fee' implies an inheritable estate, and the addition of the word 'simple,' forming the compound word 'fee simple,' as used in 'modern estates' and conveyancing, adds nothing to the force and comprehensiveness of the original term. (1 Washb. on Real Prop. 65-6.) And Mr. Washburn says that a 'fee simple is the largest possible estate which a man can have in lands, being an absolute estate in perpetuity;' and further, that 'an estate in fee simple conveys at once the idea of an interest of unlimited duration.' (Id. 59, 66.) Nor does the addition of the term 'absolute,' as 'fee simple absolute,' add anything to the force and meaning of term 'fee' or 'fee simple.' (Id.) In modern estates these several terms, 'fee,' 'fee simple,' and 'fee simple absolute' are substantially synonymous.

"It is nevertheless true that an estate in fee simple may be granted in such way and

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upon such conditions that it may be defeated
by the happening of some future event.* * "

We are of the opinion that under the doctrine above set forth, which prevails in the State of Missouri, every "fee simple estate" is an "absolute fee simple estate" and that since we hold that the estate that would be conveyed by the proposed deed would be a "fee simple estate", it would be an "absolute fee simple estate" within the meaning of the above quoted statute for the reason that terminology used by the Legislature in the enactment of the law is presumed to be used in the light of the meaning given to that terminology by the court decisions of the State.

The later Missouri case of *Bevins v. Smith*, 104 Mo. 583, l.c. 601, also holds that the terms "fee", "fee simple" and "fee simple absolute" may be used interchangeably, and quotes Tiedeman on Real Property in support of such holding.

CONCLUSION

We are, therefore, of the opinion that if the Board of Curators shall, before January 1, 1949, accept a conveyance of the land involved by a properly executed and delivered deed, following the form submitted and quoted above, the said Board will acquire an absolute fee simple title within the meaning of the Act "establishing a Missouri State Vocational School", Laws Mo. 1947, p. 364 and 365, provided the said conveyance shall be accomplished without cost to the State of Missouri.

Respectfully submitted,

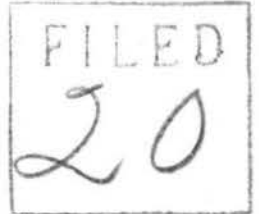
SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CIRCUIT CLERKS: Circuit clerks may charge 10¢ per hundred words and
TRANSCRIPTS: figures for preparing and certifying the record proper,
FEES: and 5¢ per hundred words and figures for inserting
and certifying the bill of exceptions or abbreviated
transcript of the evidence in cases on appeal to the
appellate courts.

May 21, 1948



5-25

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

We have your letter of recent date wherein you request
an opinion from this department on the following statement:

"The Circuit Clerk of this County desires
an interpretation of Section 13407 with
reference to fees of clerks of the Circuit
Court. The question with which he is
confronted is the fee to which he is
entitled under this section and the new
code where an appeal is taken in a civil
case. The present rules, as we understand
them, are that the entire transcript shall
be filed with the clerk and question then
arises whether or not the clerk is entitled
to five cents per hundred words for the
filing of the transcript."

Section 13407, R. S. Mo. 1939, insofar as it relates to
your question, provides as follows:

"The clerks of the several circuit courts
of this state, and of the courts of common
pleas, shall receive in all civil proceed-
ings the following fees for their services:

* * * * *

"For making transcripts for the supreme
court or either court of appeals, for
every hundred words..... .10

"Provided, that in counties containing less
than forty-five thousand inhabitants, in
cases in which the party applying for such
transcript shall furnish to the clerk of
any circuit court, court of common pleas,

or criminal courts, a typewritten copy of any bill of exceptions, or any party thereof, then it shall be the duty of such clerk, at the request of the party so applying, to incorporate such copy into such transcript, and for the part so incorporated he shall receive only five cents per hundred words and figures."

Since Mississippi County, according to the last decennial census, contains a population of less than 45,000 inhabitants, it would come within the proviso clause.

Section 135, page 393, Laws of Missouri, 1943, which prescribes the duties of the clerk in respect to transcripts, provides in part as follows:

"(a) Within ninety (90) days after an appeal is taken the appellant shall prepare or cause to be prepared and filed with the clerk of the trial court a full transcript of the record in the cause including the bill of exception. When said transcript of the record has been agreed to by the parties, or by the judge, the clerk of the trial court, under his hand and the seal of the court, shall transmit said transcript of the record to the proper appellate court: provided, however, that the appellant and respondent, or their attorneys, may agree in writing upon an abbreviated or partial transcript of the evidence, either in narrative form, or in question and answer form, and the same shall be deemed and taken as sufficient on such appeal, and shall by the clerk be incorporated in the transcript of the record and certified and transmitted by said clerk to the proper appellate court, instead of the bill of exceptions mentioned above."

Pursuant to the provisions of said Section 135, the Missouri Supreme Court has promulgated Rule 1.04. This rule, in subsection (a), provides as follows:

"The distinction between the 'record proper' and the 'bill of exceptions' for the purpose of determining what may be submitted to the

appellate court in a civil action appealed from a trial court is abolished. The full transcript of the record, for which provision is made by Section 135 (1943 Act), except when otherwise agreed, shall include in the order filed or received in the trial court, the entire evidence, including objections or requests made as required by Section 122 (1943 Act), instructions, motions, orders, rulings, and other matters to which objection is taken, and shall set forth so much of the record, or recitals thereof, as is necessary for a determination of all questions presented to the court for decision, and such transcript shall be deemed to include the bill of exceptions within the meaning of Section 135 (1943 Act). The full transcript shall always include in chronological order the pleadings upon which the action is tried, the verdict, the findings of the court or jury, the judgment or order appealed from, motions and orders after judgment and the notice of appeal, together with their respective dates of filing or entry of record. In the event that the trial court extends the time to file the transcript such orders and the dates thereof shall be included in the transcript. If the respondent is dissatisfied with the appellant's transcript he may within the time allowed for serving his brief, file such additional part of the record as he deems necessary."

It will be noted that the court, by this rule, has abolished the distinction between "record proper" and "bill of exceptions" for appeal purposes in civil cases. However, we do not think that would affect the question here. Said Section 135 requires the clerk to prepare the transcript on appeal. The transcript includes the "record proper" and "bill of exceptions." Under the foregoing rule, the "record proper" contains the pleadings upon which the action is tried, the verdict, the finding of the court or jury, the judgment or order appealed from, motions and orders after judgment and the notice of appeal, together with respective dates of filing or entry of record.

Referring again to Section 135, it will be found that the "record proper" and the "bill of exceptions" (which may be

abbreviated) constitute the transcript of record, which is certified by the clerk. This section also seems to provide that the "bill of exceptions," or the abbreviated transcript of record, is incorporated in the transcript.

Under Section 13407, supra, the clerk is allowed ten cents per hundred words and figures for making and certifying the "record proper." Under the proviso clause of this same section, the clerk is allowed five cents for incorporating the "bill of exceptions" in the transcript. From a reading of these sections, we think that the same charge would be made for incorporating the abbreviated transcript of the evidence as is allowed for the full transcript of the evidence, which is in the "bill of exceptions," because the clerk does not have to transcribe or copy the bill of exceptions or abbreviated bill of exceptions. He merely has to incorporate it in the transcript and the only other thing he has to do with this part of the record is to certify it. Apparently the lawmakers took the position that the clerk should be allowed something for inserting and certifying the bill of exceptions as part of the record, and for that reason, the said proviso clause was placed in said Section 13407, supra.

CONCLUSION

From the foregoing, it is the opinion of this department that the clerks of circuit courts in counties having less than 45,000 inhabitants are entitled to charge ten cents per hundred words and figures for copying and certifying the record proper and five cents per hundred words and figures for incorporating and certifying a bill of exceptions or abbreviated transcript of evidence, in a transcript in cases which are appealed to the appellate courts.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

DRAINAGE DISTRICTS: Merchantable timber growing in ditches of a county court drainage district may be sold by the county court and the proceeds credited to such drainage district.

FILED

20

July 10, 1948

7-12

Honorable Marshall Craig
Prosecuting Attorney
Mississippi County
Charleston, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"We have several County Court Drainage Districts in this County. The maintenance on them has not been so good and there is now a good bit of merchantable timber growing up in the ditches themselves. The question has arisen as to whether or not the County Court, as the proper supervising officials of such districts, have the authority to sell the merchantable timber and put the proceeds in the general revenue. If they do not have this authority, because their rights are easements and perhaps the adjoining land owners could sell the timber, is there any way the County Court could force the land owners to remove the timber and clear the ditch?

"Any opinions which you might give me on this matter will be greatly appreciated."

Section 12409, R. S. Mo. 1939, which is found in the article dealing with county court drainage districts, provides, in part, as follows:

" * * * Whenever any land is acquired by any district under the provision of this article and the price of such property has been paid the owner by the district, the title, use, possession and enjoyment of such property

shall pass from the owner and be vested in the district, and subject to its use, profit, employment and final disposition. * * *

Under the above-quoted provision, the title to the ditches in a county court drainage district is vested in the district itself.

Section 12433, R. S. Mo. 1939, provides that the county court shall have the continuous management and control of such drainage districts. The members of the county court, in managing and controlling a drainage district, by virtue of their offices as county judges, however, act only for the drainage district itself, and their powers are limited to using the assets of the drainage district only in improving and maintaining the ditches, drains and levees of such district.

Therefore, the county court may sell the merchantable timber which is growing in the ditches of a drainage district and must credit the amount received therefor to the credit of the drainage district, and cannot place such funds in the county revenue.

Since the drainage district has full title to all of the land used for ditches in the drainage district, the county court cannot force the landowners to remove the timber growing in the ditches.

CONCLUSION

It is the opinion of this department that the county court may sell merchantable timber which is now growing in the ditches of a county court drainage district, and that the county court must place any money derived from such sale to the credit of the drainage district.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JTB

CBB:HR

copy to Mr. Smith
STATE FAIR:
APPROPRIATIONS:

Money cannot be expended by the State out of existing or proposed appropriations for the purchase of the Veterinary Building located on the State Fair Grounds.



March 1, 1948

3/13

Honorable Tom R. Douglass
Commissioner of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"We are inclosing certain documents relating to the sale of the Veterinary Building located on the State Fair Grounds at Sedalia, Missouri.

"We would like to make a settlement of this matter, and therefore, I respectfully request an opinion as to the legality of the payment out of present Missouri State Fair appropriations or a direct appropriation to be made in the future for the purchase of this building by the State of \$1500.00 to the Missouri State Veterinary Medical Association."

The documents you enclose are (1) a letter signed by Charles W. Green, Secretary of the Missouri State Fair, dated February 27, 1940, in which it is stated that the minutes of the Missouri State Fair Board show that the State Fair Board agreed with representatives of the Missouri Veterinary Medical Association that such Association could build on the State Fair Grounds a Veterinary Building, and (2) a Memorandum of Agreement signed by certain persons as representatives of the Missouri Veterinary Medical Association and by Jewell Mayes, Commissioner of Agriculture, and Charles W. Green, Secretary of the State Fair, whereby the Missouri Veterinary Medical Association released and turned over the Veterinary Building on the State Fair Grounds to the Missouri State Fair for a purported consideration of \$1.00. It is provided in such agreement that the Party of the Second Part, that is, the Missouri State Fair, through its representatives, Jewell Mayes and Charles W. Green, agree to assist and cooperate with

the Missouri Veterinary Medical Association in asking an appropriation by the General Assembly for compensating the Association for the value of its investment in such building.

We have examined the agreement entered into between the Association and the State Fair, as represented by Jewell Mayes and Charles W. Green, and it is our opinion that such agreement is a good and valid transfer by the Missouri Veterinary Medical Association of all right, title and interest in such building to the Missouri State Fair.

Since the clear and complete title to such building is now in the Missouri State Fair, we are of the opinion that the Commissioner of Agriculture, or the Missouri State Fair, is without authority to expend money either out of a present or contemplated appropriation in order to purchase such building from the Missouri Veterinary Medical Association.

It is to be noted that there is no provision in the contract which purports to make the transfer of the right, title and interest of the Association to the Missouri State Fair dependent upon an appropriation of any amount of money for the building, but the only provision is one which states that those who sign for the Missouri State Fair will assist the Association in attempting to get an appropriation by the General Assembly. The agreement itself vests all right, title and interest of the Association in the Missouri State Fair for the stated consideration of \$1.00.

Since we hold that the agreement was a good and valid one, and binding on both parties, we deem it unnecessary to discuss whether or not the construction of the building on the Missouri State Fair Grounds, at the time of such construction, vested title in the building to the Missouri State Fair.

We do not at this time pass upon the question of whether or not the Missouri Veterinary Medical Association could, by court action, have the agreement set aside, but so long as such agreement is not set aside by the Association, it is a good, valid and binding agreement, and title to the building is now vested in the Missouri State Fair. Therefore, there is no title, right or interest in the Association for which the Commissioner of Agriculture, or the Missouri State Fair, could pay the Association.

Honorable Tom R. Douglass

-3-

CONCLUSION

It is the opinion of this department that there cannot be paid out of any present or contemplated appropriation any money to the Missouri Veterinary Medical Association for the purchase of the Veterinary Building located on the Missouri State Fair Grounds.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CP
TAXATION:
SCHOOLS:
ELECTIONS:

Tax levy voted to increase taxes for construction of new school building can be earmarked for construction of such building. Additional levy may be voted at subsequent election if necessary for construction of school building. Notice of purpose of increase and rate of increase is sufficient to earmark taxes received from such levy.

Copy to
3 Smith
March 22, 1948

FILED

24

3-29
Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"The Doniphan Consolidated School District plans to vote a tax levy under Section 10358, page 22, of School Laws of 1947 to build a new elementary school building. They wish to vote this levy and hold it over a number of years (4 years) until enough is raised to build the school building. They wish to earmark it so it can only be used to build this elementary school building and for no other purpose. Can this levy be earmarked for this purpose and thereby be used only for said purpose?

"Now suppose 4 years is not long enough to raise enough money and they vote another levy to run 4 years longer. Can this new levy also be earmarked for purpose of building a new elementary school and lumped with the first levy so earmarked and only be used for said purpose?

"If said purpose is stated in the school election notices, will this legally earmark the money so raised by said levy for said purpose so stated in said notices?"

Section 10358, Laws of Missouri, 1945, page 1629, provides as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board

of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the School Board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board; due notice having been given as required by Section 10418; and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law."

Section 10419, Laws of Missouri, 1945, page 1632, provides, in part, as follows:

"The qualified voters assembled at the annual meeting, when not otherwise provided, shall

have power by a majority of the votes cast:

* * * * *

"Fifth--To determine, in accordance with Section 10358, what rate of taxation, if any, in excess of that authorized by the constitution without voter approval, shall be levied on the hundred dollars valuation for district purposes, including the rate necessary to purchase a site, erect a schoolhouse thereon and furnish the same.

* * * * *

Section 10366, Laws of Missouri, 1943, page 893, provides, in part, as follows:

"All school moneys received by a school district shall be disbursed only for the purposes for which they were levied, collected or received. There is hereby created the following funds for the accounting of all school moneys: Teachers' Fund, Incidental Fund, Free Textbook Fund, Building Fund, Sinking Fund, and Interest Fund. * * * * * All money derived from taxation or received from the state for the erection of school buildings, from sale of school sites, schoolhouse or school furniture, from insurance, from sale of bonds, shall be placed to the credit of the 'Building Fund'. * * * "

Since Section 10419, supra, provides that the voters at the annual school meeting shall vote upon the rate of taxation in excess of that authorized by the Constitution without voter approval, including the rate necessary to purchase a site, erect a schoolhouse thereon and furnish the same, and such election is in accordance with Section 10358, supra, which provides for the voting of an increase in the tax rate, and provides that the board shall determine the purpose or purposes for which the increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which the proposed excess rate is to be effective, such sections authorize the submission to the voters of a proposition to increase the tax levy for a period of not to exceed four years for the purpose of raising money to build a new school building.

Section 10366, supra, provides for the placing to the credit of the "Building Fund" of all money derived from taxation for the erection of school buildings. Since the taxes that would be collected from a levy voted in accordance with Section 10358, supra, for the erection of a new school building would be placed in the "Building Fund," such fund could be used for no purpose other than the erection of a new school building.

Therefore, if at the end of the period for which the increased taxes for school building purposes were voted, there were insufficient funds to construct a new school building, the fund would remain intact, and any moneys voted at another election for the purpose of erecting a new school building would be added to the existing funds in the "Building Fund" and all of such funds authorized at such elections could be used only for the purpose of constructing a new school building.

Notice of the specific purpose of the rate of the increase and the number of years for which such rate of increase is to be voted, given by the board as provided in Section 10358, supra, will earmark the money collected from the levy voted at such election for the purpose for which such money was voted.

CONCLUSION

It is the opinion of this department that under the provisions of Section 10358, Laws of Missouri, 1945, page 1629, and Section 10419, Laws of Missouri, 1945, page 1632, when a tax rate increase is voted for a number of years, not to exceed four, for the purpose of constructing a new school building, the funds derived from such tax rate increase are earmarked for that specific purpose under the provisions of Section 10366, Laws of Missouri, 1943, page 893, and such funds cannot be used for any other purpose.

It is further the opinion of this department that if insufficient funds are raised from such a tax rate increase during the period for which the rate of increase was voted, a new levy can be voted for a number of years, not to exceed four, and the money derived from such tax levy may be added to that derived from the previous levy, and all of such money can be used only for the purpose of constructing a new school building.

It is further the opinion of this department that notice of the purpose of the rate of increase and the number of years of such

Honorable William Lee Dodd

-5-

increase, as required by Section 10358, supra, is sufficient to earmark the money derived from such levy so that it can be expended only for the purpose for which voted.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CONSTITUTIONAL LAW: Illegal milk delivered to dairy products
MILK: plant which has not been purchased by such
 plant may be colored with harmless color-
ing matter by agents of Department of Agriculture or any "A" or "C"
grader licensed by said department. Sec. 14103, Laws of Mo. 1945,
p. 83, is constitutional.

May 22, 1948



Honorable Tom R. Douglass
Commissioner
Department of Agriculture
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"In the enforcement of Section 14103 of the Missouri Dairy Law, which relates to the coloring of illegal dairy products, the question arises whether or not the Agents of the Missouri State Department of Agriculture or any licensed 'A' or 'C' grader, as defined in Section 14114, Laws of Missouri, 1945, would have authority to color illegal milk, which has been delivered to the platform of a dairy products plant but which has not been accepted or purchased by the plant.

"Since there is a question as to the investment of title in this milk, we would appreciate your opinion whether or not the ownership of such milk has changed from the producer to the plant when it is delivered on the platform of the processing plant. If this title has not changed from the producer to the plant, would the Agents of the Department of Agriculture or any licensed 'A' or 'C' grader be acting within their authority if they colored this milk before it was returned to the producer?

"We should also appreciate your opinion as to the constitutionality of Section 14103, Laws of Missouri, 1945."

Honorable Tom R. Douglass

The first question to be answered is whether or not Section 14103, Laws of Missouri, 1945, page 83, placing the duty upon the commissioner, his agents, or any licensed "A" or "C" grader to color any illegal dairy product which is delivered, sold, accepted, purchased, or held in possession for human food purposes with a permanent and harmless coloring matter, is constitutional.

Many courts have upheld the rule that such a provision, being one for the preservation of the health of the people, is not unconstitutional and does not violate the constitutional inhibition against taking property without due process of law. Statutes and ordinances enacted under authority of statutes have been invariably upheld as being constitutional when such statutes provided for the summary seizure and destruction of food declared by such statute or ordinance to be unlawful and injurious to the public health.

In the case of North American Storage Co. v. Chicago, 211 U. S. 306, the United States Supreme Court upheld an ordinance of the city of Chicago which provided that the employees of the health department of the city could enter any place where food was stored and were to forthwith seize, condemn and destroy any putrid, decayed, poisoned and infected food which any inspector might find in and upon such premises. The court said, l. c. 320:

"* * * The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and if so under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of

Honorable Tom R. Douglass

the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must in a subsequent action against him show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. * * *

In the case of *Blazier v. Miller*, 10 Hun. (N.Y.) 435, the Fourth Department of the Supreme Court of New York held that where the city of Syracuse, in an ordinance, provided that the inspector of milk had authority to seize, take in his possession and examine all milk offered for sale, or brought for sale into the city, upon having reasonable cause to believe that the milk was below the standard quality of pure and wholesome milk, and to destroy the same, that such ordinance did not violate the provision of the state constitution declaring that no person shall be deprived of his life, liberty or property without due process of law. The court said, l. c. 437:

" * * * But the functions of the milk inspector, under the ordinance in question, are simply ministerial. He is to destroy the milk if it is found to be below the prescribed standard; otherwise, not. In order to ascertain whether it is below the standard, he has only to measure its specific gravity by an instrument made for the purpose. He has no discretion in the matter. It is immaterial, therefore, whether the owner is present or not. If present, he could do nothing to change the result. Notice, consequently, would not avail him, and so need not be given. * * *

In the case of *Shivers v. Newton*, 45 N. J. L. 469, the Supreme Court of New Jersey held that a statute which empowered a milk inspector, if he found any can, vessel or package of milk which had been adulterated, to condemn the same and pour the contents of such can or vessel upon the ground or return the same to the consignor, was constitutional. The court said, l. c. 473:

"That the title to all private property is held subject to the paramount consideration

Honorable Tom R. Douglass

of the health and safety of the entire public, is too well settled for discussion. It is equally well established that the authority inherent in the state under the title of police power, enables the legislature to fix upon certain kinds of property or upon the manner in which property is used, the brand of noxiousness to public safety or health. And when the character of a nuisance has been so affixed to property or its use, it is a frequent exercise of legislative power in addition to the visitation of a penalty to be recovered by action, or imprisonment upon conviction under indictment to also provide for the abatement of the nuisance itself by means of a seizure and destruction of the property itself. The exercise of this power is illustrated by the numerous statutes in other states, which have received judicial sanction, among others, those providing for the seizure and destruction of liquor, the arrest and sale of straying animals, the impounding and destruction of dogs, and for the seizure and destruction of illegally baked bread. Sedg. Stat. & Const. Law 434 note, 455 note. In the case of *Weller v. Snover*, 13 Vroom 341, this court sanctioned the act of a fish warden in destroying a fish-basket by virtue of the act of 1871 (Rev., p. 433,) and the sanction is put upon the ground of the right to authorize an officer to abate a nuisance.

"In the section of the act now under inspection, the authority of the officer to destroy rests upon the fact of the adulteration or impurity of the milk, and the section further provides that if a subsequent analysis shall disclose the fact that the officer was mistaken in the result of his examination, the owner is to be paid the value of the article destroyed."

In the case of *Deems v. Mayor and City Council of Baltimore*, 30 Atl. 648, the Court of Appeals of Maryland held that an ordinance of Baltimore making it unlawful to sell or offer for sale any impure, adulterated, sophisticated or unwholesome milk or other food products, and defining pure, unadulterated, unsophisticated and wholesome milk, and providing that the milk in the possession of the person violating or neglecting to comply with

Honorable Tom R. Douglass

the provisions of the ordinance might be confiscated and destroyed by the inspector examining the same, was constitutional. The court said, l. c. 650:

" * * * And the real question, it seems to us, under the demurrer, is whether it has the power to direct that milk which is found upon inspection not to come up to the standard as thus prescribed shall be destroyed. What is termed the 'police power' has been the subject of a good deal of consideration by both the federal and state courts, and all agree that it is a difficult matter to define the limits within which it is to be exercised. Every well-organized government has the inherent right to protect the health and provide for the safety and welfare of its people. It has not only the right, but it is a duty and obligation which the sovereign power owes to the public; and, as no one can foresee the emergency or necessity which may call for its exercise, it is not an easy matter to prescribe the precise limits within which it may be exercised. It may be said to rest upon the maxim, 'Salus populi suprema lex'; and the constitutional guaranties for the security of private rights relied on by the appellant have never been understood as interfering with the power of the state to pass such laws as may be necessary to protect the health and provide for the safety and good order of society. * * *

" * * * And in *Mugler v. State*, to which we have heretofore referred, Mr. Justice Harlan says: 'The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a possessor of his property without due process of law.' * * *"

In the case of *Nelson v. City of Minneapolis*, 127 N. W. 445, the Supreme Court of Minnesota held that an ordinance of Minneapolis which provided that no person should bring into the city, or offer for sale in the city, any milk unless the owner of the cows from

Honorable Tom R. Douglass

which it was drawn should first file in the office of the commissioner of health a certificate of a licensed veterinary stating that the cows have been examined and inspected by him, given the tuberculin test, and found free from all contagious diseases, was constitutional. The court said, l. c. 447:

"Whether the ordinance, in so far as it authorizes a seizure and destruction of milk taken from uninspected cows, and brought within the city for sale, in violation of the ordinance, so violates the constitutional rights of plaintiffs, and constitutes a taking of their property without due process of law, is the important question in the case. It is urged that before destroying the milk the authorities should be required to ascertain whether it is in fact unwholesome and unfit for food, and that to permit them to destroy the same without regard to whether it is or is not free from disease germs authorizes a taking of property for public use without compensation, and is not that due process of law guaranteed by the Constitution. It is further claimed, with respect to the enforcement of police regulations, that power in the municipal officers, if constitutional rights be respected, must be limited to those methods that will work the least injury to private rights. Counsel's argument in support of their theory of the law is plausible and forceful, but we are unable to concur therein. The council determined that the tuberculin test was a reasonable and the most practicable method of insuring purity in the milk brought into the city. To enforce the regulation the council had the power to impose such penalties as would render the regulations effective and serve the purpose intended. It provided, in addition to fine and imprisonment, a destruction of the condemned milk. The authorities sustain regulations of this character. It is in fact the only feasible method of preventing contaminated or unwholesome milk from reaching the citizens, and to enforce or compel a compliance with the ordinance. A mere fine or imprisonment of the offender would not prevent the milk reaching the consumers; but its destruction, when brought into the city, is effective for all purposes. * * *

Honorable Tom R. Douglass

Since the courts have uniformly upheld the doctrine that unwholesome, impure and illegal food products may be summarily seized and destroyed, it is obvious that Section 14103, Laws of Missouri, 1945, page 83, providing for the addition only of a harmless coloring matter to such illegal products, and the addition of which coloring matter could not affect the value of the product except in so far as it would prevent consumption by human beings, does not offend the inhibitions in the state and federal constitutions prohibiting the taking of property without due process of law.

Section 14127, Laws of Missouri, 1945, page 83, sets up a standard under which a determination can be made as to whether or not the milk referred to in Section 14103 does not violate any provision of the state or federal constitutions.

The second question is: Does the fact that title does not pass between the producer and the dairy products plant prevent the coloring of unlawful milk by the commissioner, his agents, or a licensed "A" or "C" grader, when such milk is delivered to the dairy products plant?

"Deliver" is defined in Funk & Wagnalls New Standard Dictionary of the English Language, as follows:

"To place in the power or possession of another, surrender possession of; * * *"

From the fact that the terms "delivered, sold, accepted, purchased, or held in possession for human food purposes" appear in Section 14103, we believe it is obvious that the word "delivered" as used in such section should, under the provisions of Section 655, R. S. Mo. 1939, be given its plain, ordinary and usual sense.

Therefore, we are of the opinion that Section 14103 does apply to a case where a producer delivers milk to a dairy products plant, and that it is the duty of the commissioner, his agents, or a licensed "A" or "C" grader to color milk so delivered if such milk is illegal.

CONCLUSION

It is the opinion of this department that Section 14103, Laws of Missouri, 1945, page 83, is constitutional.

It is further the opinion of this department that where a producer delivers to a dairy products plant illegal milk, it is the duty of the commissioner, his agents, or a licensed "A" or

Honorable Tom R. Douglass

"C" grader to color such milk with a permanent harmless coloring matter.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

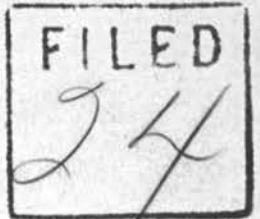
APPROVED:

J. E. TAYLOR
Attorney General

JURIES:
PAYMENT OF BOARD BILL
OF JURIES:

Board bills of juries in cases in which state is liable for costs should be submitted with the criminal cost bill and county court should not be billed for such expense.

September 22, 1948



9-23
Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Donniphan, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you submit a request for an opinion on the following question.

"When the sheriff has a board bill for the jury should he file it each month with the county court for payment or should he wait until the state allows the cost bill in the case and pays the board of the jury?

The statute which is applicable now to paying the board of juries in criminal cases is found in Section 4221, as amended, Laws Missouri, 1945, page 844:

"In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant. And in all cases of felony, when the jury are not permitted to separate, it shall be the duty of the sheriff in charge of the jury, unless otherwise ordered by the court, to supply them with board and lodging during the time they are required by the court to be kept together, for which a reasonable compensation may be allowed, not to exceed three dollars and fifty cents per day for each member of the jury and the officer

in charge; and the same shall be taxed as other costs in the case, and the state shall pay such costs, unless in the event of conviction, the same can be made out of the defendant."

It will be noted that this section provides that the costs for boarding a jury are to be taxed as other costs in the case and that the state pays the costs. There is no provision in this section for the sheriff to submit this board bill to the county court and the county court be reimbursed when the state pays the criminal costs in the case.

Since county courts are only authorized to expend money when directed by statute, and since there is no provision under the statutes for the county court to pay for board of jurors in felony cases then it would seem that the sheriff would have to follow the provision of said Section 4221 and obtain payment for the board of the jury from the state through the criminal fee bill.

CONCLUSION

It is, therefore, the opinion of this department that the county court would not be authorized to pay the board bill of juries in felony cases and that the sheriff should include this item in the fee bill in the case which is presented to the state for payment.

APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw

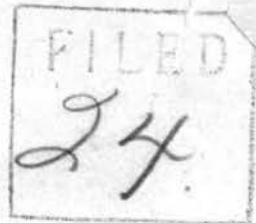
Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

Copied and sent to Phillips

INTOXICATING LIQUOR: Intoxicating liquor in interstate commerce "across" the State of Missouri from Illinois to Oklahoma cannot be seized for not bearing Missouri revenue stamps.

November 16, 1948



12-17

Honorable William Lee Dodd
Prosecuting Attorney
Ripley County
Doniphan, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads:

"I will appreciate your opinion upon the following proposition: Is it unlawful for persons to transport and possess intoxicating liquors in the state of Missouri that were purchased from dealers in the state of Illinois and consigned to points in the state of Oklahoma. Several Oklahoma truck drivers travel across this part of the state loaded with intoxicating liquors. They have a bill of lading with them showing that the intoxicating liquor was purchased in the state of Illinois, the number of cases, date of the sale and the destination points in the State of Oklahoma. But there are no Missouri stamps showing the Revenue for Missouri being paid. There is no evidence that they intend to sell or dispose of the Liquor in this state.

"Will you please let me have your opinion as to whether the laws of the State of Missouri are being violated."

After examining the Liquor Control Act of the State of Missouri, it is believed that only three sections thereof can in any light be considered as pertinent. Section 4932, R.S. Mo. 1939, refers to the transportation of nonlicensed liquor, and provides as follows:

"Any person who shall haul or transport intoxicating liquor, whether by boat, airplane, automobile, truck, wagon, or other conveyance,

in or into this state, for sale, or storage and sale in this state, upon which the required inspection, labeling or gauging fee or license has not been paid, shall upon conviction thereof, be deemed guilty of a misdemeanor." (Underscoring ours.)

Section 4931, page 1055, Laws of Missouri, 1945, concerns carriers furnishing bills of lading or receipts, when requested, on liquor shipped into this state, and provides specifically as follows:

"Every railroad, express or transportation company, or other common carrier or contract hauler, shall, when requested, furnish to the supervisor of liquor control a duplicate bill of lading or receipt, showing the name of the consignor and consignee, date, place received, destination and quantity of intoxicating liquors, received by them for shipment to any point within this state. Upon failure to comply with the provisions herein, said railroad, express or transportation company, or other common carrier or contract hauler, shall forfeit and pay to the state of Missouri the sum of fifty dollars for each and every failure, to be recovered in any court of competent jurisdiction. The supervisor of liquor control and the director of revenue are each hereby authorized and empowered to call upon the prosecuting attorneys of the respective counties or the circuit attorneys or the attorney general to bring any proceeding hereunder on the relation of the supervisor of liquor control or the director of revenue, as the case may be, to the use of the State of Missouri. The penalties collected shall be disposed of as provided by section 7, article IX, of the Constitution of Missouri, and section 10376, Revised Statutes of Missouri, 1939, as amended." (Underscoring ours.)

The last section believed possibly to be related to the problem is Section 4884, page 1045, Laws of Missouri 1945, wherein it is stated:

"No person shall possess intoxicating liquor within the state of Missouri unless the package in which such intoxicating liquor is contained and from which it is taken for consumption has upon it, while containing such intoxicating liquor, stamps of the director of revenue evidencing payment of the fees and charges required by this act. Provided further, that nothing in this act shall be so construed as to prevent the natural fermentation of fruit juices in the home for the exclusive use of the occupants of the home and their guests." (Underscoring ours.)

Regulation No. 7, subsections (d) and (e), pages 111, 112, of the Rules and Regulations of the Supervisor of Liquor Control, 1946, make approximately the same provisions and restrictions as the statutes quoted supra, and read:

"(d) Liquor Not Stamped--Contraband.--Any spirituous liquor or wine shipped into, sold or offered for sale in this State without such excise or inspection stamps or labels of appropriate number and denomination being affixed thereto, shall be deemed to be contraband and shall be by the Supervisor or his inspectors seized and disposed of as such.

"(e) Unstamped Liquor--Possession Of.--No person other than a licensed distiller, rectifier or wine manufacturer shall possess in this State any spirituous liquor or wines without the proper number and amount of Missouri excise or inspection stamps or labels being affixed to the containers thereof."

It is apparent from a reading of the statutes quoted above that they concern liquor that is brought into this state "for sale, or storage and sale in this state." Such is not the situation as stated in the letter requesting this opinion. There it is stated that the liquor is transported "across" the state of Missouri. There is no statement that such liquor, while transported across the state of Missouri, is offered for sale or stored and offered for sale in Missouri, therefore, Section 4932, supra, in the opinion of the writer,

does not apply. Section 4884, quoted above, does not apply for the reason that by its very terms it is necessary that the liquor must be taken from the container before any violation of the act can occur. This appears when the statute is read with the underlined part in mind. Section 4931, supra, is dependent upon a request being made upon the carrier, otherwise there is no duty upon the carrier to furnish, without a request, the bills of lading or receipts provided for in said section. Furthermore, it would seem that this section does not cover an individual operating his own private conveyance in hauling liquor "across" the state of Missouri.

It, therefore, is the opinion of this department that the Liquor Control Act of the State of Missouri does not contain any provision which would enable the Department of Liquor Control to seize liquor being transported from Illinois "across" Missouri to Oklahoma. As long as such liquor is not offered for sale or stored and offered for sale, in this state, there is no violation of Section 4932, supra. Nor is there any violation of section 4884, where the liquor is not taken from the original container.

From the facts stated in your request, it appears that the liquor is being carried in Interstate commerce. "Interstate Commerce" is defined in C. J., Volume 33, page 475, as follows:

"Interstate traffic. Traffic that is moved from one state or territory into or through some other state or territory."
(Underscoring ours.)

When that definition is applied to the liquor moved, as stated in your request, such liquor is being moved in interstate commerce. The protection afforded by the Commerce Clause of the Constitution of the United States applies unless such commerce is in violation of state law; Duckworth v. State, 148 S.W. (2d) 656; Barnett v. State ex rel Milner, 9 So. (2d) 267, 1.c. 268; McCanless v. Graham, 146 S.W. (2d) 137, 1.c. 138. If the transportation of liquor in interstate commerce is not violating the law of the state in which said liquor is being transported the protection afforded by the commerce clause applies. When the liquor is being transported in violation of

a state law the Twenty-first Amendment to the Constitution of the United States, as implemented by the Webb-Kenyon act, removes such liquor from the protection of the commerce clause. The Twenty-first Amendment reads as follows:

"The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." (Underscoring ours.)

The Webb-Kenyon act reads as follows: (U.S.C.A. Vol. 27, Section 122, (1935) found in the pocket supplement to said volume)

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited." (Underscoring ours.)

The operation and effect of the above quoted act is discussed in the case of Haumschilt v. State, 221 S. W. 196, where the Supreme Court of Tennessee had before it a case in which whiskey was being purchased in Missouri, loaded into an automobile by the purchaser who intended to take it to Mississippi. In order

to reach his destination, the purchaser passed through the State of Tennessee, and distinguishing that case from the present problem, Tennessee had a law prohibiting the transportation of intoxicating liquor. At l.c. 197, the Court stated:

"The Webb-Kenyon Act divests intoxicating liquors of their interstate character, as we understand it, when they are being shipped into a state to be received, possessed, sold or in any manner used in violation of the law of that state. In other words, such liquors, when in transit to such a state, are not legitimate articles of commerce, and are subject to the laws of the states into which they are brought or through which they pass. That the law of the state controls in such cases fully appears from *Austin v. State*, 101 Tenn. 563, 48 S.W. 305, 50 L.R.A. 478, 70 Am. St. Rep. 703, and the Supreme Court decisions therein reviewed."

Also, in *State v. Frazee*, 97 S. E. 604, 605, the court in applying the Webb-Kenyon Act, said:

"Thus is withdrawn from the shipment or transportation of intoxicating liquors the immunity of interstate commerce, and expressly forbidden the shipment or transportation into a state of liquors intended to be received or possessed there in violation of the law of such state. In *Clark Distilling Co. v. Western Maryland Ry. Co.*, supra, 242 U. S. 325, 37 Sup. Ct. 185, L.R.A. 1917B, 1218, Ann. Cas. 1917B, 845, the court said:

"The movement of liquor in interstate commerce and the receipt and possession and right to sell prohibited by the state law having been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that * * * there is no possible reason for holding that to enforce

the prohibitions of the state law would conflict with the commerce clause of the Constitution.' The Webb-Kenyon Act 'did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law.'"

Under the holdings of the cases quoted and cited above it is the opinion of this department that the Webb-Kenyon act removes the protection afforded by the commerce clause and destroys the interstate character of intoxicating liquors only when they are shipped or transported in violation of a state law. Unless such transportation or shipment of liquors does violate a state law, that is the law of the state in which they are being transported or shipped, the liquor retains its interstate character and remains free from seizure by reason of the commerce clause. Support for this reasoning is found in *McCanless v. Graham*, 146 S.W. (2d) 137, at l.c. 138, where the Supreme Court of Tennessee stated:

"We are further of the opinion, as was the chancellor, that the seizure was illegal because appellee was engaged in interstate commerce. Under the decisions of the Federal courts alcoholic beverages retain their interstate commerce character until they actually enter the forbidden state. *United States v. Gudger*, 249 U.S. 373, 39 S.Ct. 323, 63 L.Ed. 653; *Collins v. United States*, 5 Cir., 263 F. 657; *Whiting v. United States*, 49 App. D.C. 225, 263 F. 477; *Preyer v. United States*, 4 Cir., 260 F. 157; *Surles v. Commonwealth*, 172 Va. 573, 200 S.E. 636."

The case of *Barnett v. State ex rel Milner*, 9 So. (2d) 267, l.c. 268, discusses the problem that confronts Missouri, and holds as follows:

"We quote from 15 C.J.S., Commerce, p. 452, Sec. 99, as follows: 'As noted supra Sec. 6, the Twenty-First Amendment limits and qualifies the commerce clause of the constitution; and while it does not entirely remove intoxicating liquors from the protection of the commerce clause, it does have this effect as to their importation into a state in violation of its laws. In view of this amendment, or both the amendment and the Webb-Kenyon Act, many state

laws pertaining to intoxicating liquors have been held not invalid as violating the commerce clause of the federal constitution. However, the amendment recognizes no right in the state to enact laws concerning liquor shipped through the state; and a state law is invalid as imposing a direct burden on interstate commerce to the extent that it applies to interstate shipments through the state of liquors not to be delivered or used therein.'

"The purpose being to prevent the breakdown of state prohibition laws by importations of liquors into the state through interstate commerce, these laws are generally held to mean that intoxicating liquors remain the subject of interstate commerce until they enter the state where they are to be used or disposed of in violation of the state law.

"The late case of *Duckworth v. State of Arkansas*, 314 U.S. 390, 62 S.Ct. 311, 36 L. Ed. 294, 138 A.L.R. 1144, recognizes the right of the state to enact reasonable police regulations safeguarding the movement of intoxicating liquors in interstate commerce through the state, to the end that such liquors shall not be bootlegged in transit.

"We have found no authority for the holding of the trial court. However desirable it may be to anticipate and shut off the movement of liquors into a sister state, especially a border state, in violation of its laws, the law of the land does not render such liquors contraband while passing through this state, and authorize the seizure and condemnation of liquors and transporting vehicle under our statutes. *Moragne v. State*, 200 Ala. 689, 77 So. 322, L.R.A. 1918E, 948; *Hill v. State*, 27 Ala. App. 573, 176 So. 805, certiorari denied 235 Ala. 8, 176 So. 806; *McCanless v. Graham*, 177 Tenn. 57, 146 S.W. 2d 137; Opinion of

Attorney General, Quarterly Report, Vol. XXIII, page 241; State Board of Equalization of California v. Young's Market Co., 299 U.S. 59, 57 S.Ct. 77, 81 L.Ed. 38; Indianapolis Brewing Co. v. Liquor Control Commission, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243; United States v. Gudger, 249 U.S. 373, 39 S.Ct. 323, 63 L.Ed. 653."

As stated before, there is no statute in Missouri which makes the transportation or shipment of liquor a violation of Missouri law, even though unstamped. Lacking such a violation, it is the opinion of this department that, under the cases cited and quoted from above, the liquor moved "across" Missouri from one state to another, even though intended to be used in violation of another state's law, and not bearing Missouri stamps, retains its interstate characteristics and is free from molestation or seizure by Missouri authorities.

Some solution of this problem may be made and it is the opinion of this department that, that solution is legislative by necessity. The case of Duckworth v. State, 148 S.W. (2d) 656, describes the method used by the state of Arkansas, where a permit is required by regulation, to transport liquor in or into the state of Arkansas. That some conditions may be placed upon the transportation or shipment of liquor is upheld by that case, where at l.c. 658 the court answers the following inquiry:

"Counsel for appellant say: 'One question, and one only, is presented: that is, Does the state have power to regulate a shipment of liquor which is merely passing through Arkansas in interstate commerce'?"

"Our answer is that the state does have such right."

The Duckworth case was approved in Johnson v. Yellow Cab Co., 137 Fed. (2d) 274, l.c. 275.

Again at l.c. 660, the court, in interpreting the decision of Ziffrin Inc. v. Reeves, 1939, 308 U. S. 132, 60 S. Ct. 163, 167, 84 L. Ed. 128, stated:

"It is our view that the Ziffrin case is not altogether in point with the contro-

versy here. The Ziffirin corporation proposed to transport into Illinois liquors manufactured in Kentucky. The Supreme Court of the United States predicated its holding upon the fact that inasmuch as Kentucky had the right to prohibit the manufacture, transportation, and sale of whiskey, it had, as an incident to its power to prohibit, the right to designate the agencies of transportation, as a class, and to prohibit transportation by any other class. This, it was thought, was not a burden upon interstate commerce. Expressed differently, Illinois had no fundamental right to receive liquors from Kentucky; and lacking that right it could not complain of conditions under which limited transportation was permitted.

"In the case at bar the commodity originated in Illinois, and its destination was Mississippi. Arkansas was a mere transportation conduit through which it passed. Appellant might have received a permit if he had applied for it; but, more than eighteen months after this court had held such transportation to be unlawful, he arrogated to himself the right to disregard reasonable legal prerequisites, and now complains that our decision places a burden on interstate commerce."

"If we concede that some burden has been placed upon such commerce, the answer is that it may be done."

Some legislation might be enacted providing that it was unlawful to possess unstamped liquor within the state of Missouri and that possession of unstamped liquor was evidence of an intent to sell same within the state. Also, legislation might be patterned after the federal law which is dependent upon the quantity. That is, where one possesses more than a certain amount of unstamped liquor it would raise a presumption that such liquor was held for the purpose of sale in violation of the State law. These are merely suggestions

and cognizant of the difficulties to be encountered in proposing any salutary reform to the Liquor Control Act they can be considered merely as such.

CONCLUSION

Under the cases and statutes quoted and cited above, it is the opinion of this department that there is no method provided by law for Missouri authorities to seize liquor being transported from Illinois "across" Missouri into Oklahoma, even though such liquor does not bear Missouri revenue stamps. As long as such liquor is not sold or offered for sale, or removed from the container for consumption, within the State of Missouri, there is no violation of any Missouri law, as such liquor is in interstate commerce, and not being shipped in violation of any Missouri law.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:LR

copy to
Z. Smith

FFS: Sheriff is entitled to per diem provided in Section 13411, R.S. Mo. 1939, for attendance in courts of record. Fee is properly allowed to the sheriff and not to the deputy for the deputy's attendance.

January 22, 1948

FILED

25

2/3

Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Mr. Duggins:

This is in reply to your request for an opinion, which reads, in part, as follows:

"According to the new Constitution and the Laws of Missouri 1945, the Sheriff's office is placed on a salary basis; the question has arisen as to whether the Sheriff is entitled to receive the fees of his deputies and also the fees for himself while attending court in accordance with the order of the Circuit Judge. Your opinion in this regard would be greatly appreciated."

The Constitution of Missouri, 1945, provides in Article VI, Section 13, as follows:

"All state and county officers, except constables and justices of the peace, charged with the investigation, arrest, prosecution, custody, care, feeding, commitment, or transportation of persons accused of or convicted of a criminal offense shall be compensated for their official services only by salaries, and any fees and charges collected by any such officers in such cases shall be paid into the general revenue fund entitled to receive the same, as provided by law. Any fees

earned by any such officers in civil matters may be retained by them as provided by law." (Underscoring ours.)

The 63rd General Assembly enacted House Bill No. 899, Laws of Missouri, 1945, Section 3 of which pertaining to the duties of sheriffs in third class counties provides that "He shall retain all fees collected by him in civil matters."

Under date of January 3, 1947, an opinion from this office (Wilson) was sent to the Honorable John A. Eversole, Prosecuting Attorney of Washington County, which held that the fees for attending courts of record were in the nature of civil services and, therefore, did not violate the provisions of Section 13, Article VI of the Constitution of Missouri, 1945, relating to the officers' duties in connection with criminal matters and their pay therefor.

Washington County is a county of the third class, and, as such, the duties and compensation of sheriffs and their deputies are covered by House Committee Substitute for House Bill No. 872, Laws of Missouri, 1945, pages 1547 to 1550. However, an examination of these respective provisions in counties of the third and fourth classes shows them to be substantially the same, so that the opinion referred to above is equally applicable to both classes.

There also appears to be a question as to whom the fees should be paid for a deputy sheriff's attendance in a court of record. Section 13411, R.S. Mo. 1939, reads, in part, as follows:

"Fees of sheriffs shall be allowed for their services as follows:

* * * * *

"For attending each court of record or criminal court and for each deputy actually employed in attendance upon such court the number of such deputies not to exceed three per day 3.00

* * * * *

You will note that Section 13411 is a statute providing for fees of sheriffs. The compensation of deputy sheriffs in

third class counties is provided for in House Bill No. 899, Laws of Missouri, 1945, page 1562, under Section 2 of that bill. Nowhere is there mention of a fee to be paid deputy sheriffs for attending court. It is a general rule of law that in order for an officer to have authority to charge a fee for his services he must be able to point to the statute authorizing such charge. (Nodaway County vs. Kidder, 129 S.W. (2d) 857.) As there is no statute authorizing payment to the deputy sheriff for attendance in courts of record, we believe that the \$3.00 per diem provided by Section 13411 for the attendance of the deputy should properly be allowed to the sheriff of the county.

Conclusion.

It is the opinion of this department that the sheriff is entitled to the per diem provided in Section 13411, R.S. No. 1939, and that this allowance is not in contravention of Article VI, Section 13 of the Constitution of Missouri, 1945. The fee is properly allowed to the sheriff and not to the deputy for the deputy's attendance upon such courts of record.

Respectfully submitted,

JOHN R. DATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRE:ml

Hammett

HIGHWAY ENGINEER: In counties having a population of more than 20,000 and less than 50,000 inhabitants where the county surveyor is ex officio highway engineer, under Section 8660, R.S.Mo. 1939, the county court may not appoint a county highway engineer prior to January 1, 1949, or until after expiration of term of office of such county surveyor or a vacancy exists in the office of county surveyor.

February 9, 1948



2/5

Honorable Ralph H. Duggins
Prosecuting Attorney
Saline County
Marshall, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"This office has been requested to obtain an opinion by the honorable County Court of Saline, Saline County Missouri on the following matter: Does the County Court have any authority or control over the county engineer in third class counties to direct and authorize work on county roads, bridges and culverts in accordance with Article 9, Section 8655 to 8659 inclusive?

"The County Court has been informed that in other counties of the similar class the County Court has appointed a County Highway Engineer and that said engineer is holding office in accordance with above named sections. This office would appreciate an opinion as to whether the County Court has authority to appoint a County Highway Engineer effective January 1, 1948."

We have purposely withheld rendering this opinion until the Supreme Court had an opportunity to pass upon a quo warranto proceeding in the case of J. E. Taylor, Attorney General vs. Fred H. Kiburg, Jr., filed to determine respondent's title to office of county highway engineer in St. Louis County, Missouri.

In regard to the respective duties of the county court and county highway engineer, appointed by the county court, and how far the county court may go toward directing said county highway engineer to do said work on county roads,

bridges and culverts, we are enclosing a copy of an opinion recently rendered by this department to Honorable John E. Brooks, Associate Judge of the Franklin County Court, Union, Missouri, under date of June 10, 1947, which we believe will fully answer that part of your request.

You further inquire if the county court of a third class county may, as of January 1, 1948, appoint a county highway engineer. Section 8655, R. S. Mo. 1939, provides that the county court in any county of this state may appoint a county highway engineer, and further provides the term of office and that said court shall fix his compensation, and reads:

"There is hereby created in the several counties of the state of Missouri the office of county highway engineer, and the county courts of each county in this state are hereby authorized and empowered to appoint, and may appoint a highway engineer within and for their respective counties at any regular meeting for such length of time as may be deemed advisable in the judgment of the court, at a compensation to be fixed by the court."

Under Section 8660, R. S. Mo. 1939, among other things it provides that the county surveyor, after January 1, 1941, in counties the size of your county, shall also be ex officio county highway engineer, and reads in part:

"The county court of the several counties in this state may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, as provided in section 8657, in lieu of all fees, except such fees as are allowed by law for his services as county surveyor: Provided, that in counties in which the provisions of this article with reference to the appointment of a county highway engineer have not been suspended as hereinafter provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In

the event that the county highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court: * * * * *

Provided further, after January 1, 1941, that in all counties in the state which contain, or which may hereafter contain not less than twenty thousand inhabitants or more than fifty thousand inhabitants the county surveyor shall be ex officio county highway engineer, and his salary as county highway engineer shall not be less than twelve hundred dollars per annum, nor more than two thousand dollars per annum as shall be determined by the County Court."

The 63rd General Assembly repealed Sections 8655, 8657, 8659, 8660, 8668, 8669 and 8670, R. S. Mo. 1939, and enacted in lieu thereof three new sections known as Sections 8655, 8659 and 8660, pages 1493 and 1494, Laws of Missouri, 1945. Section 8655, page 1493, Laws of Missouri, 1945, reads:

"The county courts of each county in this state in classes two, three and four are hereby authorized and empowered to appoint and reappoint a highway engineer within and for their respective counties at any regular meeting, for such length of time as may be deemed advisable in the judgment of the court at a compensation to be fixed by the court. The provisions of this article shall apply only to counties of classes two, three and four."

Section 8660, page 1494, Laws of Missouri, 1945, reads:

"The county court may, in their discretion, appoint the county surveyor of their respective counties to the office of county highway engineer, provided he be thoroughly qualified and competent, as required by this article; and when so appointed, he shall receive the compensation fixed by the county court, and such fees as are allowed by law for his services as county surveyor: Provided, the county surveyor may refuse to act or serve as such county highway engineer, unless otherwise provided by law. In the event that the county

highway engineer cannot properly perform all the duties of his office, he shall, with the approval of the court, appoint one or more assistants, who shall receive such compensation as may be fixed by the court."

We are assuming the following to be true, that your county has a population of more than 20,000 and less than 50,000 inhabitants, and therefore, under the foregoing proviso in Section 8660, R. S. Mo. 1939, the county surveyor of your county is now ex officio county highway engineer. If this be true, then we construe the decision in State of Missouri on information of J. E. Taylor, Attorney General, Relator vs. Fred H. Kiburz, Jr., Respondent, recently rendered by the Supreme Court, to hold that H.C.S. H.B. No. 792, pages 1493-1494, Laws of Missouri, 1945, as passed by the 63rd General Assembly, does not repeal Section 8660, R. S. Mo. 1939, so long as no vacancy exists in the office of county surveyor prior to January 1, 1949. While the foregoing decision deals with another proviso in Section 8660, R. S. Mo. 1939, said provision is very similar to the one applicable to your county, and we think what the court held applies to both provisions in Section 8660, R. S. Mo. 1939. In this instance your county surveyor is not deceased, neither has he resigned. Therefore, under the foregoing decision, it is quite apparent that Section 3 of the Schedule in the Constitution of Missouri, 1945, prevents the Legislature from disturbing this office in the present incumbent's term, to which he was elected. In so holding, the court said:

"The relator further contends that even though the proviso be deemed inconsistent with Sec. 8, Art. VI, the latter section 'has been suspended by the provisions of Sec. 3 of the Schedule, at least during the terms of those persons holding office at the time of the adoption of such Constitution.' From this premise it is argued that the intent of Sec. 3 of the Schedule is 'to preserve intact for the fixed and definite period of time for which they had been appointed or elected, the offices of the persons holding them at the time of the adoption of the Constitution.' It is said that the legislature so construed these provisions when it enacted Sec. 13190a, Mo. R.S.A., Laws 1945, p. 1759, which will be hereinafter noticed.

"We are of the opinion, and so hold, that Sec. 3 of the Schedule would not operate to preserve the second proviso after Jablonsky's death for the remainder of the term for which he had been elected, and thus immunize the office from the effects of any repeal of the proviso during the whole of that period. Sec. 3 of the Schedule says, 'The terms of all persons holding public office to which they have been elected or appointed at the time this Constitution shall take effect shall not be vacated or otherwise affected thereby.' This provision was intended to protect the then incumbents, and conferred upon them the right to hold for the remainder of their respective terms; but it has no reference to their successors because it does not purport to speak with reference to the office itself. It does not mean that the office may not be affected by the provisions of the Constitution, (or a subsequently enacted statute) during the term for which the incumbent was elected, in the event of the latter's death or resignation. To hold otherwise would mean that the successor to a supreme or an appellate judge (one in office at the time the Constitution became effective) would not be bound by the constitutional requirement for retirement upon attaining the age of 75, (Sec. 25, Art. V) until the lapse of the term for which his predecessor was elected or appointed. Or, take the case of the successor to a circuit judge in the same situation. It will be assumed that because of Sec. 3 of the Schedule, the provision for compulsory retirement for disability (Sec. 27, Art. V) would not affect the incumbent judge, during his tenure, but who would contend that his successor, while serving the unexpired portion of that term, would not be subject to such provisions?"

Furthermore, in view of what has been said, we do not deem it necessary to determine at this time if Section 8655, R. S. Mo. 1939, was repealed as of July 1, 1946, or will be repealed as of January 1, 1949, as provided in Section 8659, pages 1493-1494, Laws of Missouri, 1945, which is a part of H.C.S. H.B.

No. 792, supra. There is some question as to whether the court, in the foregoing decision, passed upon that particular point; however, we can see no reason to be disturbed over that because under any circumstances at the expiration of the present term of office of your county surveyor, the county court in your county, under Section 8655, R. S. Mo. 1939, or under the same Section, page 1493, Laws of Missouri, 1945, may appoint a county highway engineer.

CONCLUSION

Therefore, it is the opinion of this department that the county court of Saline County can not appoint a county highway engineer until after the expiration of the present term of office of the county surveyor in said county, who is now ex officio county highway engineer, as provided in Section 8660, R. S. Mo. 1939. The enclosed copy of opinion rendered by this department prescribes the respective authority and duties of the county court and county highway engineer relative to maintenance, location and construction of highways and culverts.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

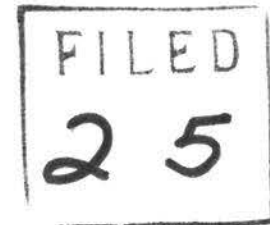
Enc.

CHIROPRACTIC BOARD:

Applicant for license must make grade of 60 per cent in each subject, and 75 per cent average on entire examination.

March 19, 1948

Dr. S. J. Durham, Secretary
State Board of Chiropractic Examiners
204 1/2 East High Street
Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this Department, which request reads as follows:

"Would you give the Missouri State Board of Chiropractic Examiners an opinion as to what the minimum grades an applicant can make to secure a license to practice the science of chiropractic in the State of Missouri."

Section 10054, R. S. Mo. 1939, (Laws Mo. 1947, p. 225) sets forth the qualifications which must be met in order for a person to obtain a license to practice chiropractic in the State of Missouri. The portion of this section, relevant to your inquiry, reads as follows:

"* * * The board shall subject all applicants to an examination in the following subjects: anatomy, physiology, symptomatology, hygiene, and sanitation, chiropractic orthopedy, pathology, principles of chiropractic, chiropractic analysis, and practical application of their knowledge and skill in chiropractic adjusting and nerve tracing. The board shall issue to such applicant, who shall correctly answer 75 per cent of all questions propounded in such examination, and who shall not fall below 60 per cent in any one subject, a license to practice chiropractic:* * *".

This provision is, we believe, clear in its meaning and not subject to interpretation.

Dr. S. J. Durham

The applicant is required to make a grade of at least 60 per cent in each of the subjects specified, and have an average grade of 75 per cent for all of the subjects. The average should be obtained by adding the grade on each of the subjects of the examination and dividing the total thus obtained by the number of subjects in the examination.

If the applicant fails to make a grade of 60 per cent in any one subject, he is not entitled to a license although his average grade might exceed 75 per cent. This requirement having been established by the Legislature, the Board of Chiropractic Examiners is without authority to waive the requirement set out therein.

CONCLUSION

An applicant for a license to practice chiropractic must have a grade of at least 60 per cent in each subject of the examination, and an average grade of 75 per cent for all subjects.

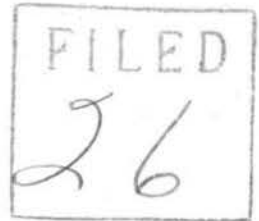
Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATES: Term of additional magistrate ends at
next general election.



January 29, 1948

2/3

Honorable Raymond Eckles
Judge of the Magistrate Court
Nodaway County
Maryville, Missouri

Dear Judge Eckles:

This is in reply to your letter of recent date in which
you request an opinion from this department on the following
set of facts:

"On the 13 day of January, 1947, I
was appointed by the Governor, and
duly commissioned and qualified, a
Magistrate within and for Nodaway
County. My commission contains the
following, '----- do hereby appoint
and commission him as Magistrate
within and for Nodaway County of the
State of Missouri until his successor
is elected or appointed as provided
by law -----.'

"Is this appointment until the next
General Election, or does it termi-
nate at the time of the ending of the
term of Probate Judge and Ex officio
Magistrate?"

Your appointment as magistrate is in accordance with the
decision of the Missouri Supreme Court, en banc, in the case
of State ex rel. Randolph County v. Walden, No. 40405, which
was handed down on December 8, 1947, but is not yet reported.
That case involved a construction of Section 1 of an act of
the 63rd General Assembly relating to magistrates, found at
page 765 of the Laws of Missouri, 1945. Section 1, among other
things, provides for the appointment of additional magistrates,
and reads, in part, as follows:

"Magistrates, as herein provided for, shall be elected at the general election to be held in 1946, and every four years thereafter, and shall hold their offices for four years, or until their successors are elected or appointed, commissioned and qualified: Provided, however, in counties of 30,000 inhabitants or less the probate judge shall be judge of the magistrate court. In counties of more than 30,000 and not more than 70,000 inhabitants there shall be one magistrate. In counties of more than 70,000 and less than 100,000 inhabitants there shall be two magistrates. In counties of 100,000 inhabitants or more there shall be two magistrates and one additional magistrate for each additional 100,000 inhabitants, or major fraction thereof. According to the needs of justice, in counties of more than 30,000 inhabitants, the foregoing number of magistrates in any county may be increased by not more than two, or such increased number may be decreased, by order of the circuit court, on petition of five hundred qualified voters of the county, and after hearing on not less than thirty days public notice to be published in some newspaper of general circulation in the county once each week for three consecutive weeks immediately preceding said hearing. No petition for additional magistrate shall be granted unless the circuit court finds from the evidence heard that the administration of justice requires that the number of magistrates be increased, and that the need for additional magistrate or magistrates is not temporary but appears to the circuit court that a permanent need exists. * * *"
(Underscoring ours.)

The court held that the underscored part of the above section was unconstitutional as an attempt to limit or restrict the terms of Section 18 of Article V of the Constitution of Missouri. In other words, additional magistrates may be appointed in any county in the state regardless of population.

With regard to the question presented concerning the term of office of such additional magistrates appointed pursuant to said Section 1, your attention is directed to the last part of that section, which provides:

"Such additional magistrates shall be appointed by the governor when authorized by proper order of the circuit court certified to him, and such appointee shall hold office until the next general election at which election a successor shall be elected to hold office for the unexpired term or full term as the case may be, said terms to be identical with that of other magistrates."

It is provided that additional magistrates shall be appointed by the Governor and shall hold office until the next general election. We believe that this is the controlling provision, therefore your term of office will run until the next general election which will be held in November of 1948. At this election a successor will be elected to hold said office for the period of the unexpired term of the present probate judge and ex officio magistrate so that the terms of all magistrates will thereafter be identical. The language of Section 1 is clear and unambiguous and will admit of no other construction. It must be given effect as written. *St. Louis Amusement Company v. St. Louis County*, 147 S.W. (2d) 667, 347 Mo. 456; *State ex rel. Jacobsmeyer v. Thatcher*, 92 S.W. (2d) 640, 338 Mo. 622; *Cummins v. Kansas City Public Service Co.*, 66 S.W. (2d) 920, 334 Mo. 672."

Conclusion.

In view of the foregoing, it is the opinion of this department that your term of office as additional magistrate within and for Nodaway County will terminate at the next general election.

Respectfully submitted,

APPROVED:

DAVID DONNELLY
Assistant Attorney General

J. E. TAYLOR
Attorney General

DD:ml

COUNTY TREASURER:
HIGHWAY ENGINEER:
SURVEYOR:

County treasurer elected in 1948 in township organization county serves 4 year term. County surveyor is to be elected in 1948, but by such election does not become ex officio highway engineer.

February 6, 1948



Honorable A. E. Elliott
Prosecuting Attorney
Vernon County
Nevada, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"The County Court has requested me to ask you * * * how long County Treasurer is elected for in 1948 in township organizational counties. Is it two or four years?

"Also does the County Surveyor run in 1948 as County Surveyor and Ex-officio County Highway Engineer? Does he have to be a licensed engineer?

"Our County Court desires the above information from you."

Section 13789a, Laws of Missouri, 1947, page 429, provides as follows:

"In counties of Classes 3 and 4 the qualified electors shall elect a county treasurer at the general election in the year 1950, except that in those counties having adopted the township alternative form of county government the qualified electors shall elect a county treasurer at the November election in 1948. The county treasurer so elected shall be commissioned by the county court of his county, shall enter upon the discharge of the duties of his office on the first day of January following his election, and shall hold his office for a term of

Honorable A. E. Elliott

four years and until his successor is elected and qualified unless sooner removed from office. In counties which have adopted the township alternative form of county government the treasurer's term shall extend until the 1st day of April next after the election of his successor."

From the above quoted statute, it is clear that the term of office of the county treasurer in counties of Classes 3 and 4 of this state is four years, and that the county treasurer in counties under township organization shall be elected in presidential years and shall serve for a term of four years.

Section 13190, Laws of Missouri, 1945, page 1759, provides that the voters of counties in this state in Classes 2, 3 and 4 shall elect a surveyor at the general election in the year 1948.

Section 8655, Laws of Missouri, 1945, page 1493, provides that the county court in each county of this state in Classes 2, 3 and 4 may appoint and reappoint a highway engineer.

Section 8660, Laws of Missouri, 1945, page 1494, provides that the county court may, in its discretion, appoint the county surveyor to the office of county highway engineer if he is thoroughly qualified and competent.

Section 8659, Laws of Missouri, 1945, page 1493, provides that Sections 8655 and 8660 are to become effective January 1, 1949, unless necessary to remove any inconsistency with the Constitution of this state, and in such case shall be effective July 1, 1946.

Sections 8655 and 8660 will be in effect when the surveyor who is elected at the general election in 1948 takes office. Since, under the provisions of such sections, the appointment of the county highway engineer is exclusively a matter in the control of the county court, the surveyor who is elected will be elected as surveyor only, and not as ex officio highway engineer, in counties of Classes 2, 3 and 4.

Section 8658, R. S. Mo. 1939, provides that the county highway engineer shall be a resident of the State of Missouri and shall be skilled in the laying of drains, in bridge, culvert and road building and general road work, and shall have a practical knowledge of civil engineering, and shall be active and diligent in the discharge of his duties. Any person possessing such qualifications is qualified and competent to be county highway engineer.

Honorable A. E. Elliott

CONCLUSION

It is the opinion of this department that:

(1) The county treasurer elected in 1948 in counties under township organization shall serve for a term of four years.

(2) The county surveyor in counties of Classes 2, 3 and 4 does not run in 1948 as ex officio highway engineer. The qualifications required in Section 8658, R. S. Mo. 1939, are sufficient for a person to be appointed county highway engineer.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MOTOR VEHICLES: Provisions of Motor Vehicle Safety Responsibility Act inapplicable to claim allowed in bankruptcy proceeding.

October 1, 1948

FILED

26

10-11
Mr. R. N. Eidson, Supervisor
Motor Vehicle Registration Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"It is hereby requested that your Department render an official opinion as requested in the enclosed letter, viz: Whether the allowance of a Claim in Bankruptcy is the same as a judgment in a Civil Court?"

The facts relating to the allowance of the claim mentioned are set out in the letter enclosed with your opinion request from which we quote:

"On April 2, 1948, an automobile, driven by Mr. X, drove on the wrong side of the highway and across the black line on 23rd Street, a street in the Inter-City district in Jackson County, Missouri, and as a result, the car operated by Mr. X ran into an automobile owned and driven by Mr. Y, the collision occurring approximately one-half mile east of the Blue River and as heretofore stated, on 23rd Street.

"Demand was made on Mr. X for payment of \$239.76, the amount of damages sustained by Mr. Y. Suit was threatened and Mr. X filed a petition in bankruptcy, listing the claim of Mr. Y. Mr. Y filed an itemized statement of his claim and it was duly allowed by the bankruptcy court, thereby making Mr. Y a creditor and entitling him to share in the assets of the estate as a general creditor, provided there were

assets. As is so often the case of a bankrupt individual, the estate was a non-asset one and there was nothing left for the general creditors. Mr. X is now filing application for discharge and there having been no objections filed, he will be discharged."

We have taken the liberty of substituting other designations for the names of the persons mentioned in the letter.

The Motor Vehicle Safety Responsibility Act is now found as Article 5, Chapter 45, Mo. R.S.A. After providing for the suspension of drivers license, motor vehicle registration, etc., for conviction for certain specified criminal offenses, forfeiture of bail, etc., the act makes further provision for such suspension upon failure to satisfy judgments rendered in actions arising from the negligent operation of motor vehicles. We quote from Section 8470.15, Mo. R.S.A.:

"(a) The commissioner also shall suspend the license and all registration certificates or cards and registration plates issued to any person upon receiving authenticated report, as hereinafter provided, that such person has failed for a period of 30 days to satisfy any final judgment in amounts and upon a cause of action, as hereinafter stated."

Also Section 8470.19, Mo. R. S.A., reads in part as follows:

"(b) The clerk of a court or the judge of a court which has no clerk shall forward to the commissioner a certified record of any judgment for damages, the rendering and nonpayment of which judgment requires the commissioner to suspend the license and registrations in the name of the judgment debtor hereunder, such record to be
⑤ forwarded to the commissioner immediately after such judgment has become final."

Your inquiry then presents the question of whether or not a claim allowed against a person adjudicated a bankrupt is comprehended within the terms "judgment" as used in the act.

In this regard, your attention is directed to the following definition of the word found as a part of Section 8470.12, Mo. R.S.A., reading as follows:

"'Judgment'. Any judgment which shall have become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle, for damages, including damages for care and loss of services, because of bodily injury to or death of any person, or for damages because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on any agreement or settlement for such damages."

From the foregoing, it seems that the term "judgment" as used in the act refers only to such judgments as might be rendered in an adversary action and upon the rendition of which the liability of the operator of the motor vehicle becomes fixed. No reference is made in the definition to allowed claims in bankruptcy such as the one described in the inquiry. On the contrary, we find the following contained in Section 8470.16, Mo. R.S. A.:

"(b) A discharge in bankruptcy following the rendering of any such judgment shall not relieve the judgment debtor from any of the requirements of this act."

The usage of the word "judgment" in these various statutes and the clear and unambiguous definition of the term which also appears in the act and which has been quoted supra seems to limit the application of the act to those judgments as fall within the definition.

The General Assembly has not seen fit to extend the operation of the Motor Vehicle Safety Responsibility Act to the nonpayment of claims against bankrupts as the particular case which is described in the letter of inquiry, nor has it seen fit to extend the operation of the act to failure to discharge other claims which might arise by reason of

Mr. R. N. Eidson

-4-

settlements being made between the parties to motor vehicle collisions or other negligent operations resulting in personal injuries or property damage. We, therefore, must construe the act as it is written and limit its application to those institutions to which, by its own terms, it does apply.

CONCLUSION

In the premises, we are of the opinion that an allowed claim against a bankrupt which remains unsatisfied is not comprehended within the meaning of the term "judgment" as used in the Motor Vehicle Safety Responsibility Act.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:VLM

Hammett
MAGISTRATES:

STATE HIGHWAY PATROL:

CRIMINAL LAW:

Members of the State Highway Patrol may execute warrants anywhere in the State of Missouri when directed to them for the arrest of persons for criminal offenses pertaining to the operation of motor vehicles upon the highways of this state.

February 21, 1948

FILED

27

Honorable R. A. Esterly
Assistant Prosecuting Attorney
Jasper County
Carthage, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"A question has arisen in connection with the Magistrate Court for the Eastern District of Jasper County as to whether or not the members of the State Highway Patrol have authority to serve a warrant issued by that Court. In this particular instance a misdemeanor (weight case) occurred in the Eastern District of Jasper County. The violator was directed by the Patrol to appear in Magistrate Court but failed to do so. An information was filed and a warrant issued in due course.

"Under the above facts, would a member of the State Highway Patrol have authority to arrest the violator any place in the State of Missouri and return him to Jasper County for prosecution? The warrant above mentioned was given to the sheriff of Jasper County. Could a warrant be issued directly to some member of the State Highway Patrol?"

Apparently the offense alleged to have been committed in the presence of the highway patrolman was the operation of a motor vehicle weighing in excess of that allowed under the law to be operated on the highways of this state. Section 8406, R. S. Mo. 1939, fixes the maximum weight that may be carried over the highways of this state. Section 8410, R. S. Mo. 1939, makes it a misdemeanor to violate Section 8406, supra.

Certainly no one can question the right of the highway patrolman making an arrest when such an offense is committed

in his presence. Under Section 8358, R. S. Mo. 1939, the Legislature made it the mandatory duty of the highway patrolman to enforce and prevent violations relating to offenses committed upon the state highways and specifically vested authority in such officers to arrest any person committing certain offenses and to take them before the proper officials for prosecution. Said Section 8358 reads:

"It shall be the duty of the patrol to police the highways constructed and maintained by the commission; to regulate the movement of traffic thereon; to enforce thereon the laws of this state relating to the operation and use of vehicles on the highways; to enforce and prevent thereon the violation of the laws relating to the size, weight, and speed of commercial motor vehicles and all laws designed to protect and safeguard the highways constructed and maintained by the commission. It shall be the duty of the patrol whenever possible to determine persons causing or responsible for the breaking, damaging or destruction of any improved hard surfaced roadway, structure, sign markers, guard rail or any other appurtenance constructed or maintained by the commission and to arrest persons criminally responsible therefor and to bring them before the proper officials for prosecution. It shall be the duty of the patrol to cooperate with the secretary of state and the motor vehicle commissioner in the collection of motor vehicle registration fees and operators and chauffeurs licenses and to cooperate with the state inspector of oils in the collection of motor vehicle fuel taxes."

Furthermore, under Section 8359, R. S. Mo. 1939, members of the highway patrol are specifically declared to be state officers and shall be so deemed and taken in all courts having jurisdiction against the laws of this state. The same provision further vests in such patrolmen the same power now or hereafter vested in peace officers, except the serving or execution of civil process. Said Section 8359 reads:

"The members of the patrol are hereby declared to be officers of the state of Missouri and shall be so deemed and taken in all courts having jurisdiction of offenses against the laws of this state. The members of the patrol shall have the powers now or hereafter vested by law in peace officers except the serving or execution of civil process. The members of the patrol shall have authority to arrest without writ, rule, order or process any person detected by him in the act of violating any law of the state. When a member of the patrol is in pursuit of a violator or suspected violator and is unable to arrest such violator or suspected violator within the limits of the district or territory over which the jurisdiction of such member of the patrol extends, he shall be and is hereby authorized to continue in pursuit of such violator or suspected violator into whatever part of this state may be reasonably necessary to effect the apprehension and arrest of the same and to arrest such violator or suspected violator wherever he may be overtaken."

We also find similar authority to be vested in members of said patrol under Section 8358a, page 656, Laws of Missouri, 1943, in making arrests and investigations. Said Section 8358a reads:

"The members of the State Highway Patrol shall have full power and authority as now or hereafter vested by law in peace officers when working with and at the special request of the sheriff of any county, or the chief of police of any city, or under the direction of the superintendent of the State Highway Patrol, or in the arrest of anyone violating any law in their presence or in the apprehension and arrest of any fugitive from justice on any felony violation. The members of the State Highway Patrol shall have full power and authority to make investigations connected with any crime of any nature. The expense for the patrol's operation under this section shall be paid monthly by the

the state treasurer chargeable to the General Revenue Fund, provided, however, the amount appropriated from the General Revenue Fund shall not exceed ten per cent (10%) of the total amount appropriated for the Missouri State Highway Patrol."

Furthermore, the salary and expenses of such patrolmen are paid by the State of Missouri. (See Section 8357, page 323, Laws of Missouri, 1947, and Section 8365a, page 657, Laws of Missouri, 1943.) Section 8356, R. S. Mo. 1939, requires each member of the highway patrol to take an oath and give a bond for the faithful performance of his duties.

The foregoing statutes relating to the authority vested in members of the highway patrol and their duties clearly support our conclusion that such officers are state officers, not only is this true by reason of the statutes declaring them so but all of the foregoing provisions so indicate. We all know that the principle reason for creating the highway patrol was to enforce laws relating to the operation of motor vehicles on the highways, and to properly and efficiently carry out such duties said patrolmen must have jurisdiction over the whole state and not just a part of it. Therefore, since the members of the State Highway Patrol are state officers, they have jurisdiction coextensive with the boundaries of this state.

In view of the fact such officers are state officers, we construe Section 8359, supra, in giving such patrolmen authority as is now or may hereafter be vested in peace officers, to mean that such officers may execute a warrant for a criminal offense, not civil, anywhere in the State of Missouri, by reason of the fact their jurisdiction is state-wide and not merely confined to a county.

However, we are of the opinion that the warrant should be issued to the highway patrolman instead of to the sheriff or some other county officer since the decisions seem to hold that it is a direction only to the officer named in the warrant in the absence of a statute specifically authorizing other officers to serve such process when directed to another officer. In *McGloughan et al. vs. Mitchell et al.*, 36 S.E. 164, 1.c. 165, 26 N.C. 681, the court, in so holding, said:

" * * * A constable cannot serve process addressed to the sheriff, nor can a sheriff serve process addressed to a constable. Murfree, Sher. Section 115. An officer

may utterly disregard any process or writ not directed to him. He is a stranger to it, and, if he exercises power under such writ, it is an act of usurpation, and he will be liable in damages for any injury done, as if he were a private citizen. * * "

In Foster vs. Wiley, 27 Michigan 244, l.c. 249, the court indicated that the officer would be liable for executing process had the statute not authorized and empowered sheriffs to serve process which constables may execute, and in so holding, the court said:

"The case of the officer is next to be considered. It is claimed, first, that he is liable because the process was not addressed to him, and therefore he had no authority to serve it. But the statute expressly empowers sheriffs to serve the process which constables may execute; * * "

(See also Winkler vs. State, 32 Ark. 539, l.c. 546, 547.)

CONCLUSION

It is, therefore, the opinion of this department that a member of the State Highway Patrol shall arrest any person violating any law relating to the operation of motor vehicles on the highways committed in his presence. Furthermore, said members of the highway patrol may execute criminal process anywhere in the State of Missouri when directed to them by a magistrate for the arrest of persons violating any law pertaining to the operation of motor vehicles on the highways of this state; however, said warrant should be directed to the member of the highway patrol and not to the sheriff or other county officers.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JET*
Attorney General

ARH:VLM

71
b6
CORPORATION FRANCHISE TAX: Foreign corporation not required to pay Missouri corporation franchise tax in year of commencing business in the state.

March 10, 1948



3/11

Honorable Clarence Evans, Chairman
State Tax Commission of Missouri
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office and reading as follows:

"On December 30, 1947, consumation of re-organization of the Chicago, Rock Island, & Pacific Railway Company was ordered by Federal District Judge Igoe, at Chicago. The order provided authorization for the manager and re-organized company to proceed with consumation of plan and for transfer of properties of debtor to re-organized company on January 1, 1948.

"The old company was the Chicago, Rock Island & Pacific Railway Company and their license to do business in Missouri is still in effect. The new company, the Chicago, Rock Island & Pacific Railroad Company, was organized under the Laws of Delaware, December 16, 1947, and on January 2, 1948, wired the Secretary of State's Office asking to file application to do business in Missouri.

* * * * *

"From the information we have the court order was dated December 30, 1947, and the date of delivery was January 1, 1948. Consequently, it would appear that the old company did no business in Missouri on January 1, and the new company was not licensed to do business until January 2. However, somebody operated this property in Missouri on January 1, 1948.

"The same property is involved regardless of the company and we would appreciate an opinion from you as to who is liable for the 1948 Corporation Franchise Tax."

From the facts stated, it is clear that the new corporation did not commence business in Missouri until January 1, 1948.

Two statutes appear relating to the imposition of franchise taxes upon foreign corporations. One, Section 4997.135, Mo. R.S.A., forms a part of "The General and Business Corporation Act of Missouri," found Laws of 1943, page 410. This act was approved August 6, 1943, becoming effective upon the adjournment of the General Assembly, in accordance with the provisions of Article IV, Section 36, Constitution of 1875, and Section 659, R. S. Mo. 1939.

The other statute relating to the taxation of corporate franchises is found as Section 5113, R. S. Mo. 1939, as amended, Laws of 1943, page 406. Peculiarly enough, the latter statute was repealed by "The General and Business Corporation Act of Missouri," referred to above, but, in spite of such repeal, the statute was amended and reenacted by the same General Assembly. It was approved July 15, 1943, becoming effective upon the adjournment of the General Assembly, in accordance with the constitutional and statutory provisions, mentioned supra. It, therefore, appears that both acts became effective upon the same date.

No substantial differences appear in the two acts, material to the matter here being considered, except the following proviso contained in Section 5113, as found Laws of 1943, page 406:

" * * * Provided, that no tax shall be imposed on corporations organized under the laws of this state on or after January 1, in any year, or on foreign corporations that commence business in this state on or after January 1, in any year, for the year in which said domestic corporations were organized, or the year in which said foreign corporations commenced business in this state: * * * "

We have here, then, a situation in which the General Assembly, at the same session, passed two laws relating to the same subject matter, effective upon the same date, one of which laws contained a grant of exemption, and the other of which did not.

It is our thought that such grant of exemption represents a special law in so far as it relates to corporations organized under the laws of the state or commencing business within the state in the first year of their operation. Therefore, in accordance with the ordinary rule of construction that, in such circumstances, the special law is presumed to represent the intent of the General Assembly and to prevail over the general treatment of the same subject matter, we believe the exemption proviso to be applicable to the present case. Illustrative of this rule of statutory construction is *State ex rel. v. Brown*, 68 S. W. (2d) 55, 1. c. 59, wherein the Supreme Court quoted approvingly the following language from *Tevis et al. v. Foley*, 30 S. W. (2d) 68:

" * * * In such case the rule applicable is that 'where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them, the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.' *Tevis et al. v. Foley*, 325 Mo. 1050, 1054, 30 S. W. (2d) 68, 69; *State ex rel. Buchanan County v. Fulks*, 296 Mo. 614, 626, 247 S. W. 129; *State ex inf. Barrett v. Imhoff*, 291 Mo. 603, 617, 238 S. W. 122. * * *"

That such construction properly reflects the legislative intent is borne out by two other matters which come readily to mind. For instance, the computation of the annual franchise tax, under the provisions of Section 4997.136, Mo. R. S. A., is based upon a report of the various corporations subject to franchise tax, reflecting the financial structure of each corporation as of the 31st day of the preceding December. Such information would, of course, not be available for a newly organized domestic corporation nor for a foreign corporation just commencing business in

Missouri. Again, newly formed domestic corporations and foreign corporations commencing business in the state are required to pay organization taxes, which closely approximate the annual franchise taxes due thereafter upon equivalent amounts of property and assets employed in Missouri. In other words, such organizational fees roughly amount to the taxes which would otherwise be due. The foregoing is persuasive, to our mind, to the view that the exemption proviso was intended to be applied.

Two other matters appear in your letter of inquiry which we shall dispose of.

We note that you state "it would appear that the old company did no business in Missouri on January 1." This presents a factual situation about which we can, of course, formulate no opinion. If it develops that in fact the old company did exercise corporate functions on January 1, then the old company will be subject to the annual franchise tax for the calendar year 1948. In this regard, see the official opinion of this office, directed to yourself, under date of June 4, 1946.

We note, too, the further statement in your inquiry that "the new company was not licensed to do business until January 2." This is not material to the determination of your major question, as under Section 4997.135, Mo. R. S. A., the franchise tax is imposed upon foreign corporations "engaged in business in this state whether under a certificate of authority issued under this Act or not." Of course, the engaging in business by a foreign corporation prior to having received the proper certificate of authority to do so from the Secretary of State would subject such foreign corporation to the penalties provided by "The General and Business Corporation Act of Missouri."

CONCLUSION

In the premises, we are of the opinion that a foreign corporation commencing business in Missouri on or after January 1 of any calendar year is not required to pay the annual Missouri corporation franchise tax for the calendar year in which such business is commenced.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

76

WFB:HR

TAXATION AND REVENUE:

Missouri State Tax Commission does not have authority to apportion "distributable property" of railroad company or similar public utility to public library districts.

May 11, 1948



Honorable Clarence Evans, Chairman
Missouri State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office and reading as follows:

"We would be glad to have your opinion as to whether the Missouri State Tax Commission has authority under the law, to allocate the distributable property located within Public Library Districts in Missouri."

The term "distributable property," used in your letter of inquiry, refers to the property of railroads and other public utility companies which, under the provisions of paragraph (12) of Section 11033.14, Mo. R. S. A., is required to be originally assessed by the State Tax Commission and the valuation thereof apportioned to the various counties and other minor subdivisions.

Paragraph (12) of Section 11033.14, Mo. R. S. A., reads, in part, as follows:

"The Commission shall have the exclusive power of original assessment of railroads, railroad cars, rolling stock, street railroads, bridges, telegraph, telephone, express companies, and other similar public utility corporations, companies and firms.
* * *"

After having made such original assessments, the State Tax Commission is thereafter required to apportion such aggregate value of all property of each railroad and other similar public utilities to the counties and various minor subdivisions, under the provisions of Section 11280.11, Mo. R. S. A., reading, in part, as follows:

Honorable Clarence Evans

"Said commission shall apportion the aggregate value of all property hereinbefore specified belonging to or under the control of each railroad company, to each county, municipal township, city or incorporated town, special road districts, public water supply, fire protection and sewer districts or subdivision, except school districts, in which such road is located, according to the ratio which the number of miles of such road completed in such county, municipal township, city or incorporated town, special road district, public water supply, fire protection and sewer districts or subdivision, except school districts, in which such road is located, shall bear to the whole length of such road in this state: * * * "
(Emphasis ours.)

You will note that the latter section does not specifically mention public library districts, although having enumerated numerous political subdivisions having the power to tax. We, therefore, believe that such failure to include public library districts within the enumerated political subdivisions to whom apportionment must be made of a pro rata part of the aggregate value of such railroads and similar public utilities precludes the State Tax Commission from making such apportionment thereto.

Prior to the amendment of this section found in Laws of 1941, page 695, and the subsequent reenactment of the section in its present form, Laws of 1945, page 1825, the section had been the subject of a judicial construction in *State ex rel. Halferty v. Kansas City Power & Light Co.*, 145 S. W. (2d) 116. This was an action brought to subject certain distributable property of the utility company named as defendant to taxation for the benefit of a public water supply district. It was there contended that the State Tax Commission had the power to apportion to such political subdivision a portion of the total aggregate valuation of such public utility by reason of such public water supply district being a "municipal township." The Supreme Court rejected this contention, saying, 1. c. 122:

"From the foregoing it appears the county court is not authorized to levy taxes upon the distributable property of railroads until the valuation thereof, as equalized and adjusted by the State Board of Equalization, has been certified to it, and may then levy for municipal townships, cities and

other local subdivisions only as by the statutes provided. This brings us to consideration of an insistence strongly urged by appellant, viz., that the water district should be regarded as a 'municipal township' within the meaning of these taxing statutes. It, of course, is not a county nor an incorporated city, town or village. * * * A municipal township may be, for some purposes and in a broad sense, a 'municipal corporation'--(we suggest this thought without deciding the question)--but, even if so, is a 'municipal corporation' necessarily a 'municipal township?' It is to be borne in mind that taxing statutes are construed strictly in favor of the taxpayer, bearing in mind that they should be applied with due regard to the apparent intention of the Legislature as expressed in the statute, with a view to promoting the apparent object of the legislative enactment. It will be noted that in all of the taxing provisions we have noted the words 'municipal townships' have been used. Nowhere are the words 'municipal corporations' used. Appellant says 'municipal township' is not defined by our statutes. We think its meaning, as used in the statutes we have quoted, is well understood and is clearly enough indicated as a subdivision of a county. * * * From these and other references in the statutes that might be made we think it too clear to admit of argument that when the Legislature used the term 'municipal townships' in the statutes above referred to it meant subdivisions of a county as that term is generally understood.

"It is suggested by appellant that when Sec. 10022, providing the method of taxing railroad properties, was first enacted such 'public corporations' as defendant water district did not exist and could not be specifically referred to, and, if we understand his argument, that the meaning of 'municipal township' should be extended or enlarged so as now to include such public corporations, since created. The term 'municipal townships' has been retained in the statutes. We must assume that it was purposely retained and intended to mean what it clearly does mean." (Emphasis ours.)

Honorable Clarence Evans

It is interesting to note that subsequent legislative enactments and amendments to the section as it was written at the time of the decision of the Halferty case, cited supra, in September, 1940, have only extended the provisions to include special road districts, public water supply, fire protection and sewer districts or subdivisions, and have not brought within the statute public library districts. In the absence of such legislative action, it is our thought that the principles enunciated in the Halferty case are still controlling with respect to public library districts.

CONCLUSION

In the premises, we are of the opinion that the State Tax Commission is not authorized to apportion to a public library district any part of the total valuation of the "distributable property" of a railroad or other similar public utilities.

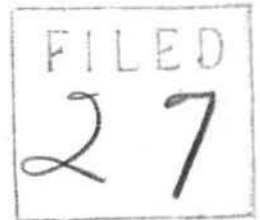
Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AGRICULTURE: It is lawful to sell colored oleomargarine in the
OLEOMARGARINE: State of Missouri.



June 29, 1948

7-8

Honorable R. A. Esterly
Assistant Prosecuting Attorney
Jasper County
Joplin, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading, in part, as follows:

"One of our local grocers has been advised by a large manufacturer of colored oleomargarin that there is no State law limiting his right to sell colored oleo in this community and that by obtaining the necessary Federal licenses there is no criminal liability in connection with such sales. This grocer has called on me for an opinion and in view of the various conflicting statutes on this matter, I would appreciate your advice."

"My attention is particularly called to Section 14073 of the Revised Statutes of 1939, but I am not entirely satisfied with my interpretation of this statute since it would appear that if this law would prevent the merchant from selling colored oleo it would also prevent even a housewife from mixing artificial color into her margarin."

The sections of the law to be considered with regard to your request are Sections 4776, 14073, and 4778, R. S. Mo. 1939. Such sections provide as follows:

Section 4776. "Whoever manufactures out of any oleaginous substances, or any compounds of the same, resembling butter in appearance, manufactured from cattle fat

or hog fat, or such substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine and neutral, all lard extracts and tallow extracts, and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, vegetable oil, annatto and other coloring matter, intestinal fat and offal fat, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese, produced from pure, unadulterated milk, or cream of the same, or any article made in imitation of butter, or when so made calculated, or intended to be sold as butter or for butter, unless said manufacturers shall pack said imitation substitute in firkins, tubs or wooden or paper packages, with the true name of said imitation substitute clearly and indelibly branded, marked or labeled thereon, or whoever shall sell or offer for sale the same as an article of food, unless said imitation substitute is properly packed in firkins, tubs or wooden or paper packages, with the true name of said imitation substitute clearly and indelibly branded, marked or labeled thereon, shall be guilty of a misdemeanor, and shall on conviction thereof be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both."

Section 14073. "No person shall combine any animal fat or vegetable oil or other substance with butter, or combine therewith or with animal fat or vegetable oil or combination of the two, or with either one, any other substance or substances whatever, any annatto or compound of the same, or any other substance or substances, for the purpose or with the effect of imparting thereto a yellow color, or any shade of yellow, so that such substitute shall resemble yellow or any shade of genuine yellow butter, nor introduce any such coloring matter or such substance or substances into any of the articles of which the same is composed: Provided, nothing in said sections

14072 to 14084 shall be construed to prohibit the use of salt and harmless coloring matter for coloring the substitutes for butter manufactured for export or sale outside the state. No person shall, by himself, his agents or employees, produce or manufacture any substance in imitation or semblance of natural butter, nor sell, nor keep for sale, nor offer for sale, any imitation butter made or manufactured, compounded or produced in violation of this section, whether such imitation butter shall be made or produced in this state or elsewhere. This section shall not be construed to prohibit the manufacture and sale, under the regulations hereinafter provided, of substances designed to be used as a substitute for butter, and not manufactured or colored as herein prohibited."

Section 4778. "That for the purposes of this section certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef, fat, suet, lard, lard oil, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat--if (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum. This section shall not apply (1) to puff pastry shortening not churned or emulsified in milk or cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more, nor (2) to any of the following containing condiments and spices: Salad dressing, mayonnaise dressings, or mayonnaise

products, nor (3) to pharmaceutical preparations. Oleomargarine made and manufactured from the ingredients, commodities or combinations thereof herein named and set forth shall be sold or offered for sale only when the containers or cartons thereof have printed thereon the word 'oleomargarine.' Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, fined not less than fifty (\$50.00) dollars not more than two hundred (\$200.00) dollars, for each and every offense."

Section 4776 was enacted in its present form in 1887 and is found Laws 1887, page 174. The emergency clause of such act provides as follows:

"The fact that the business interest of the state of Missouri is suffering by the prohibition of the manufacture and sale of butter substitutes therein, creates an emergency within the meaning of the constitution; therefore, this act shall take effect and be in force from and after its passage."

From the language above quoted, it is clear that in enacting Section 4776, oleomargarine was considered by the Legislature to be a butter substitute.

Section 14073 was enacted in 1895 and is found Laws 1895, page 26, Section 2. In the case of Bockstruck, 136 Mo. 335, a conviction under this section was upheld where the evidence showed that yellow oleomargarine was sold. In the case of State v. Swift & Co., 273 Mo. 462, 200 S. W. 1066, the Supreme Court held that this section prohibited the selling, keeping for sale, or offering for sale of oleomargarine colored to resemble butter. Under these holdings of the Supreme Court, the provisions of Section 14073, prohibiting the sale, keeping for sale, or offering for sale of any oleomargarine colored to resemble butter, constituted an exception to Section 4776, in so far as Section 4776 permitted the sale of oleomargarine colored with annatto and other coloring matter.

Section 4778 was enacted in 1929 and is found Laws 1929, page 107, and was enacted some thirty-four years after Section 14073 was enacted. A general rule of statutory construction is

found in State v. Carolene Products Co., 144 S. W. (2d) 153, 1. c. 156, where the Supreme Court said:

"Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication." Quoted with approval in the case of State ex rel. Buchanan County v. Fulks, 296 Mo. 614, 247 S. W. 129, loc. cit. 132."

Since Section 4778 is a statute which deals specifically and in detail with oleomargarine and was enacted later than Section 14073, we believe that that part of Section 4778 reading:

* * * * Oleomargarine made and manufactured from the ingredients, commodities or combinations thereof herein named and set forth shall be sold or offered for sale only when the containers or cartons thereof have printed thereon the word 'oleomargarine.'
* * *

constitutes an exception to Section 14073, in so far as Section 14073 prohibits the sale of oleomargarine which is colored yellow, and that Section 4778 makes lawful the sale of oleomargarine which has been colored yellow if the container of the oleomargarine has printed thereon the word "oleomargarine."

Honorable R. A. Esterly

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CONCLUSION

It is the opinion of this department that it is lawful in the State of Missouri to sell oleomargarine which has been colored yellow when the containers or cartons thereof have printed thereon the word "oleomargarine."

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

TAXAT AND REVENUE: Foreign corporation not engaged in business in Missouri is not liable to Missouri franchise tax.

FILED

27

August 19, 1948

8.25

Honorable Clarence Evans
Chairman, State Tax Commission
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Re: Corporation Franchise Tax - Texas
Eastern Transmission Corporation

"On March 1 we received the 1948 Corporation Franchise Tax Report from the above corporation. On Line 12 of said report calling for property and assets in Missouri, they quote \$8,201,672.76. The assessment was made on this figure and the tax of \$4100.84 was certified to the Director of Revenue who in turn forwarded a statement for that amount to the corporation.

"This week the attorney for the corporation called on us stating that they felt they were not liable for corporation franchise tax because they did no business in Missouri. It appears that this corporation is operating under a certificate of authority from the Secretary of State which was granted in October 1947. They have approximately 140 miles of line in Missouri, entering the state on the South and leaving the state on the East. They have one pumping station at Oran, Missouri. This is strictly a gas corporation and they neither buy or sell gas within the State of Missouri. The only office maintained is a registered office in St. Louis, Missouri, as required by the Secretary of the State, how-

ever, this office is merely a place for them to receive mail.

"We will appreciate your advising us whether or not this corporation is subject to a corporation franchise tax for 1948."

Although not so stated directly in your opinion request, we infer that the corporation referred to therein is one whose domicile is in a foreign state, which inference is confirmed by further advice from you.

The Missouri franchise tax is imposed under the provisions of Section 4997.135, Mo. R. S. A. The pertinent provisions of this statute read as follows:

" * * * Every foreign corporation engaged in business in this state whether under a certificate of authority issued under this Act or not, shall pay an annual franchise tax to the state of Missouri equal to one-twentieth of one per cent of the par value of its outstanding shares and surplus employed in business in this state, or if the outstanding shares of such corporation or any part thereof consist of shares without par value, then, in that event, for the purposes herein contained, such shares shall be considered as having a value of \$5.00 per share, unless the actual value of such shares should exceed \$5.00 per share, in which case the tax shall be levied and collected on the actual value and the surplus, and for the purposes in this Act such corporation shall be deemed to have employed in this State that portion of its entire outstanding shares and surplus that its property and assets in this state bear to all its property and assets wherever located:
* * * "

In construing this section as previously found, in which the same terminology was employed by the General Assembly, the Supreme Court of Missouri has held that the tax levied thereunder is one upon the privilege of transacting business in this state as a corporation. We quote from State v. Pierce Petroleum Corporation, 2 S. W. (2d) 790, 1. c. 794:

"The tax is not a property tax, but an excise levied upon the privilege of transacting business in this state as a corporation. State v. Tax Commission, 282 Mo. 213, 221 S. W. 721.
* * *

This construction has been reaffirmed in subsequent cases, notably Missouri Athletic Ass'n v. Delk Investment Corp., 20 S. W. (2d) 51, and other cases.

This construction has been further narrowed in State v. Shell Pipe Line Corp., 139 S. W. (2d) 510, 1. c. 521, to mean only engaging in business of an intrastate nature directly incident to the primary purposes of the corporation.

We consider the foregoing to be pertinent in view of the statement incorporated in your opinion request to the effect that the corporation "did no business in Missouri."

The question of whether or not a foreign corporation is "engaged in business" within the State of Missouri, within the meaning of the franchise taxing statutes, is, in each case, one of fact. The decisions of the various state and federal courts are not in accord as to the indicia that must be looked to in determining whether certain acts constitute the "doing of business." This variation may be explained by reason of the problem having been approached not only from the angle of taxation, but also with respect to jurisdiction over such foreign corporations, the method of obtaining service thereon, liability for criminal acts of officers and agents, etc. However, the rule seems to be well settled in Missouri that "engaged in business" means the carrying out of corporate functions necessarily incident or directly connected with the primary charter purposes. Such being the case, and if it be determined, as a matter of fact, that the corporation now under consideration does not "engage in business" within this state, we believe that no liability for Missouri franchise tax exists.

We do wish to point out that cases holding, under similar circumstances, that liability does exist are not apposite, inasmuch as some taxing statutes impose liability solely upon the basis of a foreign corporation having the right to engage in business within the state into which it enters, without regard to whether or not such corporate functions are in fact actually exercised. Therefore, such cases do not serve to impose liability upon the corporation now under consideration.

Honorable Clarence Evans

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CONCLUSION

In the premises, we are of the opinion that a foreign corporation, not actually engaged in business in Missouri, is not liable for the Missouri franchise tax, even though a large proportion of the assets of such foreign corporation are physically situate within this state.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

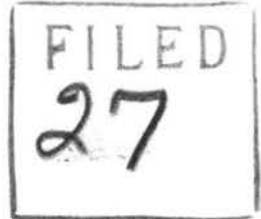
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OFFICERS:
TOWNSHIP COLLECTOR:

Township collector by changing his residence to another township does not thereby forfeit his office and may collect taxes in the township in which he is elected until he is removed.

November 8, 1948

FILED 27



Mr. Clarence Evans, Chairman
State Tax Commission
Jefferson City, Missouri

Dear Mr. Evans:

We have yours of recent date in which you request an opinion from this department on the question of whether or not a township collector who has changed his residence from the township in which he is elected to another township in the county, may still collect taxes for the township in which he is elected.

Section 13953, R. S. Mo. 1939, provides as follows:

"No person shall be eligible to any township office unless he shall be a qualified voter and a resident of such township."

From this section it is apparent that a township collector must be a resident of the township.

Section 13962, R. S. Mo. 1939, provides for the township board to fill a vacancy which may occur in any office in the township.

The question here presented is, "Does the township collector forfeit his office and thereby become disqualified from collecting taxes by virtue of the fact that he has moved out of the township, or does he hold this office until he is removed by proper procedure?"

Under Section 12828, R. S. Mo. 1939, which is a general section on the removal of officers, it is provided as follows:

"Any person elected or appointed to any county, city, town or township office in this state, except such officers as may be subject to removal by impeachment, who shall fail personally to devote his time to the performance of the duties of such office, or who shall be guilty of any willful or fraudulent violation or neglect of any official duty, or who shall knowingly or willfully fail or refuse to do or perform any official act or duty which by law it is his duty

to do or perform with respect to the execution or enforcement of the criminal laws of the state, shall thereby forfeit his office, and may be removed therefrom in the manner hereinafter provided."

It will be noted from this section that a change of residence of the officer is not grounds for removal under this section and that procedure for removal under this section is prescribed. In other words, even though the officer may forfeit his office under some of the grounds mentioned in this statute, a procedure for removal must be instituted.

In the case of State ex inf. McKittrick vs. Wilson, 166 S. W. (2d) 499, the court had before it the question of whether or not a clerk of the circuit court "forfeits" his office for failing to personally devote his time to the duties of the office. The court in laying down the rules as to whether or not the clerk would be entitled to a hearing or whether or not he automatically forfeited the office under the charges set out therein, said:

"Unless an office is abandoned or relinquished an officer is entitled to a trial on the charge of failing personally to devote his time to the performance of his duties. Such failure may be excusable. * * * Verily a public office is held on the implied condition that the officer will perform the duties belonging to it. However, Mechem in his work on Public Officers points out that generally it is a willful refusal to perform the duties of an office which works a forfeiture so that a judgment of ouster is necessary. * * *"

We also refer you to State ex inf. McKittrick vs. Wymore, 119 S. W. (2d) 941, (943), wherein the court approvingly quoted the following rule:

"Where a statute requires an officer to keep his office open for transaction of official business, during certain hours of a particular day, and provides that his failure so to do, unless caused by sickness, 'shall forfeit his office,' a forfeiture on that ground can be enforced only by proceedings in the nature of a quo warranto and cannot be made part of the judgment, on conviction of a misdemeanor for neglecting the duties of his office. * * *"

Mr. Clarence Evans

-3-

These authorities, we think, clearly demonstrate the rule in Missouri to be that even though an officer does not comply with the statute as to residence yet he would not forfeit the office by not so complying. However, by not complying with the "residence" requirements of the statute might be grounds for a proceeding for removal but until such proceeding is brought and determined the officer would be entitled to hold the office and perform the duties thereof.

CONCLUSION

From the foregoing, it is the opinion of this department that a township collector who removes from the township in which he is elected and holds office, as such officer, may collect the taxes in that township until he is removed by quo warranto proceedings or any other proceedings prescribed by statute.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw

TAXATION: Corporation electing to file franchise tax return under Section 144, Laws of Missouri, 1943, page 410, is to be taxed upon total value of assets.

November 29, 1948



Honorable Clarence Evans
Chairman
State Tax Commission
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"The report of the above company was filed February 21, 1948 together with a balance sheet. However, they failed to fill in lines 12, 13 and 14 calling for the assets within and without the State of Missouri. They attached to the report Item 16, the following:

"Pursuant to the terms of Section 144 of the General and Business Corporation Act of Missouri 1943, this Company elects to report and pay the fees on all of its outstanding shares (1,268,657 shares of the par value of \$1.00 per share), whether employed in Missouri or not, and consequently the Company is not required to set out the value of its property within or without the State of Missouri.'

"This is a Delaware corporation using all of its capital in Missouri and showing assets of \$12,756,911.57. The assessment was set at this amount calling for a tax of \$6,378.46. * * * * *

Section 144 of an act found Laws of Missouri, 1943, page 410, reads as follows:

"All insurance companies, building and loan associations, and other corporations, the

Honorable Clarence Evans

fees of which are fixed at lump sums by this Act, and all corporations which employ all their property and all their outstanding shares in this state, or which will report and pay the fees on all of its outstanding shares, whether employed in this state or not, shall not be required to set out in the report required by this Act the value of its property within this state or without the state."

(Underscoring ours.)

The corporation mentioned in your letter of inquiry has elected to file its franchise tax return under the emphasized portion of the statute quoted and now contends that only the par value of its shares should be used in computing the tax due. The determination of the question involves the construction of the emphasized portion of the statute.

At the outset may we point out that this statute does not in any manner impose the Missouri franchise tax. The tax itself is imposed under Section 135 of the act referred to supra, and it is noted therein that in each instance the tax is computed upon the total value of the property or assets of the corporation employed in business in the State of Missouri. This has long been the nature of the corporation franchise tax imposed by this state as was held in *State ex rel. vs. State Tax Commission*, 221 S.W. 721, where in the Supreme Court of Missouri, en banc, said, l.c. 726:

"A franchise tax is not one levied upon property, but one placed on the right to do business. It may be graduated according to the extent of the business done. The act before us contemplates a tax upon the right to do business in accordance with the property actually used in the business."

Reference to Section 136 of the act discloses that the report therein required of corporations liable to the Missouri franchise tax includes items reflecting the amount of the assets or property of such corporation employed within and without the State of Missouri. The purpose of this information is to permit the State Tax Commission in assessing the corporation franchise tax to have such information available in computing such tax, or in the case of corporations having no par value stock to permit the State Tax Commission to determine the total value of the assets and property of the corporation and thereby arrive at a basis upon which the franchise tax may be computed. Section 144, in our opinion, merely relieves certain types of corporations from

Honorable Clarence Evans

making the allocation of property and assets between those employed within the State of Missouri and those employed without such state. It does not purport to change the basis upon which such tax is to be computed as has heretofore been pointed out has always been the amount of property and assets employed in business in this state.

Concededly, the wording of Section 144, and particularly the emphasized portion thereof, is somewhat ambiguous. However, considering the emphasized portion of the statute in relation to other statutes relating to the Missouri corporation franchise tax and in relation to other portions of itself, and keeping in mind the nature of such tax in this state, we believe a proper construction of such portion of Section 144 will require that the corporation franchise tax be computed upon the entire value of all of the property and assets of such corporation. To place any other construction upon this portion of the statute would produce a lack of uniformity in the taxation of corporations similarly situated and would amount to discrimination. The construction which we have placed upon the statute will impose corporation franchise tax liability upon all corporations in exactly the same relative amounts and computed upon the same basis.

We also wish to point out that the question herein involved will not arise in subsequent years as the 64th General Assembly, by an act found Laws of Missouri, 1947, Vol. II, page 221, has rewritten and reenacted Section 144 of the act found Laws of Missouri, 1943, page 410, quoted supra. The revised statute now appears as Section 4997.144, Mo. R. S. A.

CONCLUSION

In the premises, we are of the opinion that a corporation electing to file its corporation franchise tax under the second alternative found in Section 144 of an act found Laws of Missouri, 1943, page 410, is liable for Missouri franchise tax computed upon the total value of its assets and property.

Respectfully submitted,

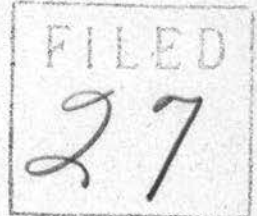
WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ROADS AND BRIDGES: General road district in county under township organization may contribute funds to county court for construction of bridge over stream dividing township from another township within same county.

December 11, 1948



12-22
Honorable C. E. Ernst
Prosecuting Attorney
Gentry County
Albany, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"During this year an election was held in Athens Township in Gentry County, Missouri to vote a thirty-five cent additional levy for roads and bridge purposes. The proposition carried and the tax money accruing to the township as a result of this additional levy is estimated at about Nine Thousand Dollars.

"The Township Board has requested that I write to you for an opinion as to whether or not, they can use Four Thousand Dollars of this tax money as a contribution to the construction of a bridge across Grand River which is a dividing line between Athens and Cooper Townships. As I understand it Cooper Township is making no contribution toward the construction of this bridge."

Section 12 of Article X, Missouri Constitution of 1945, authorizes a special election in general or special road districts to levy an additional tax not to exceed thirty-five cents on each one-hundred dollars assessed valuation of real and tangible personal property within the district, the proceeds of such tax, when authorized, to be placed to the credit of the road district authorizing the levy.

Gentry County is a county of the third class and has adopted township organization. The powers and duties of township directors relative to roads and bridges in counties having township organization are set out in Art. 17, Ch. 46, R. S.

Mo. 1939 (Sections 8813-8835).

The only provisions in that article dealing with the construction of bridges are Sections 8824 and 8825. Section 8824 imposes upon the township board of directors the duty of constructing all bridges in their districts costing less than \$100.00.

Section 8825 provides as follows:

"Whenever it shall be necessary in any township to build a bridge, the cost of which shall exceed one hundred dollars, the township board of directors shall make out and cause to be presented to the county court a certified statement of the amount of money necessary for the construction thereof, and, if deemed proper, the said county court shall cause the bridge to be built by contract as provided by law."

The article is silent on the matter of whether the county court or the township board shall bear the cost of bridges in excess of \$100.00. The general law relating to the construction of bridges (Art. IV, Ch. 45, R. S. Mo. 1939) sheds no light on the question.

Section 8534 provides that no road district shall be compelled to build a bridge which costs \$50.00 or more. The use of such language would appear not to preclude a road district's voluntarily constructing a bridge costing in excess of that amount.

There is no prohibition against the use of the fund in question for the purpose suggested. We wish to point out that the fund is not raised by the township directors acting on behalf of the township as such, but, rather, is imposed on behalf of the general road district formed as required by Section 8014 R. S. Mo. 1939. As was pointed out by the Supreme Court in the case of State ex rel. Moore v. Wabash Railway Co., 208 S.W.(2d) 223, the additional thirty-five cent tax which is the source of the fund here in question may be levied only by a road district and may not be levied by a township as such, in the absence of the formation of a general road district.

Section 12 of Article X of the Missouri Constitution of 1945 and the laws enacted pursuant thereto (Laws 1945, page 1478) make no specific provision for the expenditure of the funds resulting from such levy, the section merely providing that taxes collected shall be "placed to the credit of the road district authorizing such public levy."

In the absence of any statutory prohibition against the use of the money for the purpose in question we do not feel that such use would constitute a misappropriation of the fund by the township directors. Certainly the bridge in question will result in benefit to the residents of the township in which the tax has been levied. In the absence of such contribution the county court may well be in no position to undertake the construction and the residents of the township would be harmed thereby although there were more than sufficient funds in the hands of the general road district to provide for the construction. There might appear to be some inequity in the present situation inasmuch as Cooper township, which may be equally benefitted by the construction, is making no contribution toward the construction. That alone, however, would not seem to cause the expenditure by the Athens township directors to be a misappropriation if they see fit to voluntarily contribute funds on behalf of that township.

CONCLUSION

Therefore, we are of the opinion that a general road district, in a county having township organization, which has imposed the additional tax authorized by Section 12, Article X, Mo. Constitution 1945, may contribute funds raised by such additional tax to the county court for the construction of a bridge over a stream which separates the township in which the additional tax has been imposed from another township within the same county.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

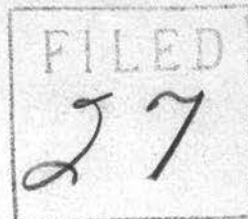
APPROVED:

J. E. TAYLOR *JTB*
Attorney General

RRW:mw

INSURANCE: Approval of proceedings for increase of capital stock
of Commonwealth Life and Accident Insurance Company.

December 30, 1948



12-31
Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Attention: Mr. Glen D. Evans

Dear Sir:

This is to acknowledge your letter of recent date in which you request an opinion from this department on the legality of the proceedings of the Commonwealth Life and Accident Insurance Company in the matter of increasing the capital stock of that company.

You have enclosed with your request a copy of the proceedings for said increase of capital stock. We have examined the copy of the record showing the proceedings for the increase of the capital stock of said Commonwealth Life and Accident Insurance Company conducted by said company on the 24th day of November, 1948 and find that they are in proper form and that they comply with the statutes of this state in such cases made and provided.

CONCLUSION

It is, therefore the opinion of this department that the proceedings for the increase of the capital stock of the Commonwealth Life and Accident Insurance Company certified as of the 24th day of November, 1948, are in proper form and comply with the statutes of Missouri in relation to the increase of capital stock by corporations and that these proceedings are valid and legal.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:mw

DRAINAGE AND
LEVEE DISTRICTS:

St. John Drainage and Levee District has implied authority to enter into assurances assuring the United States that it will maintain, after construction, the levee the construction of which is contemplated by the United States.

February 24, 1948

FILED

2/26 3.0

Col. L. H. Foote
Office of the District Engineer
War Department
Corps of Engineers
P.O. Box 97
Memphis 1, Tenn.

Dear Sir:

We have your letter of December 31, 1947, in which you request an opinion of this department. Your letter is as follows:

"The St. John Levee and Drainage District of Missouri, by resolution of its Board of Supervisors, has given to the United States its assurance that it will maintain and operate certain levee and drainage works after their completion by the Federal Government. Upon examination of the resolution it appears that there may be some question as to the legal authority of said district to give such assurances. Accordingly, it will be appreciated if you will furnish your opinion with respect to the legal authority of the St. John Levee and Drainage District to enter into such an agreement with the Federal Government and perform the obligations set forth in its resolution of assurance, copy of which is inclosed. It is our information that said district was organized under a decree of the Circuit Court of New Madrid County, Missouri, on 29 March 1912 with rights, powers, and authorities conferred by Article 9, Chapter 41, Revised Statutes, 1909, as amended and extended by an act approved 12 April 1911.

"The levee and drainage works to be constructed by the Federal Government were authorized by the Flood Control Act of 1946, approved 24 July 1946, Public Law 526, 79th Congress, 2d Session,

at an estimated cost of \$1,300,000, substantially in accordance with the report of the Chief of Engineers dated 16 April 1946, which is set forth in House Document No. 138, 80th Congress, 1st Session, copy of which is inclosed. The work presently proposed consists of the enlargement of some 17 miles of the existing Birds Point-New Madrid Floodway levee; the construction of a closure levee across St. John Bayou; and the construction of a concrete drainage structure at St. John Bayou crossing, as outlined on the attached print, which also shows the pertinent limit of the St. John Levee and Drainage District.

"Inasmuch as acceptable assurances must be furnished by the levee district before Federal funds can be expended, it will be appreciated if you will furnish your opinion at your earliest convenience."

You have also transmitted with your letter House Document No. 138, 80th Congress, 1st Session, together with an attached print showing the proposed levee construction project, and also a copy of the resolution of assurance passed by the St. John Levee and Drainage District Board of Supervisors.

We have given careful consideration to your letter after examination of the aforesaid enclosures and after an examination of the statutes of the State of Missouri relating to the organization, powers and functions of drainage and levee districts. Having in mind your citation to the Federal Flood Control Act of 1946 in your above quoted letter and the aforesaid documents, we assume that your inquiry extends to the question pertaining to the authority of the District under the law of Missouri to give assurances to the Secretary of War as to providing rights-of-way holding the United States harmless, and maintaining the levee after construction, as required by U.S.C.A., Title 33, Section 701(c) and similar sections. The last above cited section provides as follows:

"After June 22, 1936 no money appropriated under authority of section 701f of this title shall be expended on the construction of any project until states, political subdivisions

thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army: * * *

We have given careful consideration to the question as to whether such authority is vested by Missouri law in Missouri drainage and levee districts generally, and particularly, whether it is vested in the St. John District, which is the one directly involved in your inquiry.

Your information as to the Missouri statutes under which the St. John Drainage District was organized and now exists is in accord with the information we have; namely, the district was organized under the provision of Article 9, Chapter 41, Revised Statutes of Missouri, 1909. This same article now appears in the Missouri statutes as Article 7, Chapter 79, Revised Statutes of Missouri 1939. All of Chapter 41 and all of Chapter 79 deal with the organization and functioning of different types of levee and drainage districts. During the intervening years between 1909 and 1939 various amendemnts were made to the different articles appearing in these chapters, but Article 9 of Chapter 41 has been carried down and now appears as Article 7 of Chapter 79 in substantially the same language that existed at the time that the St. John Levee and Drainage District was organized. In considering the above cited statutes showing the source and origin of the authority for the creation of drainage and levee districts and defining their powers as existing corporations, it is necessary to give attention to the purpose of such organizations, or, in other words, their functions, in order to arrive at conclusions as to the extent of their powers, both express and implied. The purpose for the creation and operation of such districts is quite definitely set forth by Section 12492, Revised Statutes of Missouri 1939, the section providing for the organization of districts, and under which the St. John District was organized, in the following language:

"The owners of a majority of the acreage in any contiguous body of * * * land subject to overflow, wash or bank erosion, situate in

one or more counties in this state may form a levee district for the purpose of having such land * * * reclaimed and protected from the effects of overflow and other water, for sanitary or agricultural purposes, or from the effect of wash or bank erosion * * * by levee, * * * and for that purpose they may make and sign articles of association * * *

Accordingly, the outstanding purpose in the creation and operation of such districts is the protection by levee of the land within their boundaries from overflow and bank erosion.

These districts created and operated under such statutes are political subdivisions of the state and exercise governmental functions. Houck v. Little River Drainage Dist., 239 U. S. 254; 1.c. 262; 60 L. ed. 266, 1.c. 273; Land & Stock Co. v. Miller, 170 Mo. 240, 1.c. 253; Little River Drainage Dist. v. RR, 236 Mo. 94, 1.c. 111-12; Houck v. Little River Drainage Dist., 248 Mo. 373, 1.c. 382-3; State ex rel McWilliams v. Little River Drainage Dist., 269 Mo. 444, 1.c. 458; State ex rel Caruthers, v. Little River Drainage Dist., 271 Mo. 429, 1.c. 435-6; State ex rel Caldwell v. Little River Drainage Dist., 291 Mo. 72, 1.c. 78-9; State ex rel Kinder v. Little River Drainage Dist., 291 Mo. 267, 1.c. 277; State ex rel D'Arcourt v. Daues (LRDD), 253 SW (Mo.) 966; State ex rel Schwepker v. Daues (LRDD), 253 SW (Mo.) 968; State ex rel Hougden v. Allen, 298 Mo. 1.c. 455, et seq; Sigler v. Inter-River Drainage Dist., 311 Mo. 175, 1.c. 198; Anderson v. Inter-River Drainage Dist., 309 Mo. 189, 1.c. 209. Their character as such has been proclaimed not only by the Supreme Court of Missouri but also by the Supreme Court of the United States as set forth in the following quotation from the opinion of the Supreme Court of the United States in Houck v. Little River Drainage District, 239 U. S. 254, 1.c. 262:

"The district is, indeed, a conspicuous illustration of the class of enterprises which have been authorized in order to secure the recognized public advantages which will accrue from reclaiming and opening to cultivation large areas of swamp or overflowed lands. (Citation of long list of authorities omitted). It was constituted a political subdivision of the state for the purpose of performing prescribed functions of government. (Citation of authorities omitted.)

These drainage districts, as the supreme court of the state has said, exercise the granted powers within their territorial jurisdiction 'as fully, and by the same authority, as the municipal corporations of the state exercise the powers vested by their charters'. 248 Mo. 383."

In recognition of the public functions of drainage and levee districts and of their status as political subdivisions of the state, it has been held that they are municipal corporations within the meaning of Section 6, Article X of the 1845 Constitution of Missouri, exempting the property of municipal corporations from taxation. Grand River Drainage District of Cass and Bates Counties v. Reid, 111 S.W. (2d) 151; State ex rel. Caldwell v. Little River Drainage District, 291 Mo. 72, l.c. 78-9; State ex rel. Kinder v. Little River Drainage District, 291 Mo. 267, l.c. 277. The same constitutional provision has been embodied in the new Constitution. Article X, Section 6, Constitution of Missouri 1945.

It is a well recognized principle that a corporation having certain granted powers for the carrying out of a definite objective has the implied power to supplement its specifically granted powers for the purpose of accomplishing that objective. In speaking of implied powers of corporations, this rule is stated in 19 C.J.S., page 694, Section 1122, as follows:

"The charter of the corporation need not expressly confer on it power to contract. Where not prohibited it has an implied power to make all such contracts as are necessary and proper to enable it to perform the purposes of its creation. * * * "

In the law pertaining to the organization and operation of levee districts there is not only an absence of any prohibition against contracting to effectuate the general objective of the act, which, according to the express provision of the statute as set forth supra, is: " * * * having such land * * * reclaimed and protected from the effects of overflow and other water, for sanitary or agricultural purposes, or from the effect of wash or bank erosion * * * by levee * * * ." But there is, on the contrary, an express provision of the statute to the effect that said law shall be liberally construed by the courts in carrying out this legislative intent and purpose. This provision is set

forth in Section 12546, Revised Statutes of Missouri 1939, as follows:

"* * * This article is hereby declared to be remedial in character and purpose, and shall be liberally construed by the courts in carrying out this legislative intent and purpose, * * *"

In this connection, we also suggest the fact that, according to our best information, the boards of supervisors of levee districts in Missouri have for years considered that they had authority to give assurances of the character involved in the instant case to the United States, and have frequently done so, and that the United States has frequently acted pursuant to such assurances. It is a well recognized principle that the construction placed upon an act by those charged with the duty of administering it is to be given great weight although it is not binding upon the court. *Ross v. Kansas City, St. J. & C. B.R. Co.*, 111 Mo. 18, 19 S.W. 541; *Ewing v. Vernon County*, 116 S.W. 518, 216 Mo. 681; *Folk v. City of St. Louis*, 157 S.W. 71, 250 Mo. 116.

Furthermore, Section 12612 of Chapter 79, Revised Statutes of Missouri 1939, provides:

"All drainage and levee districts * * * are hereby authorized and empowered to do each and every act necessary to be by them performed in order to comply with or avail themselves of the provisions of any legislation now enacted or that may be hereafter enacted by the congress of the United States of America, having for its purpose * * * or otherwise lightening the present burdens of taxation resting on the lands and property in such districts."

We have been informed that the St. John Drainage and Levee District now has outstanding \$150,000 of bonds and annually levies taxes for the retirement of its bonds and the maintenance of the works and improvements previously constructed in the district, and that the construction of the proposed levee will greatly enhance the benefits received, and that the present burden of taxation will be lightened by the construction thereof. If the cost of the contemplated levee, as set out in the documents accompanying your letter,

were required to be paid by the district, it would be prohibitive to its taxpayers. Since the assurances set forth in the submitted resolution by the Board of Supervisors of the St. John Drainage and Levee District were adopted by said Board as a necessary step in the procuring of the construction of a levee by the United States Government, the construction of which would afford protection to the land in the District to a much greater extent than the taxpayers themselves could pay for if the District was required to construct a \$1,350,000 levee, it is very apparent that the act of the Board in entering into such assurances is in complete harmony with the salient purpose of the statute; namely, " * * * having such land * * * protected from the effects of overflow * * * by levee."

CONCLUSION

We are, accordingly, of the opinion that the Board of Supervisors of the St. John District had implied authority to enter into such assurances as are required by U.S.C.A., Title 33, Section 701c, as a condition precedent to the expenditure of Federal money on the construction of the contemplated levee, and, more particularly, that said Board had the implied authority to enter into the assurances embodied in the resolution submitted.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:LR

BAIL BONDS: The clerk of the circuit court may fix bail and take a bond or recognizance where the defendant is under arrest or in custody after an information or indictment has been filed, and when court is not in session.

March 3, 1948.



3/10

Honorable Robert C. Frith
Prosecuting Attorney
Livingston County
Chillicothe, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our attention has been called to Section 3885 and 3962 of the Revised Statutes of Missouri, 1939, as amended and there seems to be some difficulty as to whether the Clerk of the Court can take a bond and under what circumstances. I would appreciate it if you would give me an opinion on this point."

Section 3885, R. S. Mo., 1939, as amended, Laws 1945, p. 841, reads as follows:

"Whenever any person shall be committed to jail on a warrant of commitment by any magistrate for a bailable offense, the recognizance, with proper security, may be taken by the court or judge of the court having criminal jurisdiction, and in case of the absence of the judge of such court having criminal jurisdiction from the county, such recognizance may be taken by any judge of a court of record, except a judge of the probate court."

Section 3962, R. S. Mo., 1939, reads as follows:

"When the defendant is in custody or under arrest for a bailable offense, the court in which the indictment or information is pending may let him to bail and take his bond or recognizance, or, if the court is not in session, the clerk of the court may fix the amount of such bail and take his bond or recognizance."

Your attention is called to the fact that these two sections are by their terms applicable in two separate situations. Sec. 3885 is applicable whenever a person has been committed to jail on a warrant of commitment by a magistrate, and Sec. 3962 is applicable when a person is under arrest or in custody at the time of the filing of an indictment or information.

Section 3893, R. S. Mo. 1939, requires that a preliminary hearing be held before a magistrate prior to the filing of an information charging a felony.

Section 3876 provides for the magistrate's taking a recognizance, if the offense charged is a bailable one.

Section 3877 provides that if sufficient bail is not offered, the person shall be committed to the county jail to await trial.

Section 3878 requires the magistrate, whenever a person is committed to jail for a bailable offense, to endorse on the warrant of commitment, the sum in which bail was required.

Thereafter, and prior to the time an information is filed, where the person charged has not previously been able to offer sufficient bail, the recognizance must be taken in accordance with Section 3885. That section specifies the officers who may take a recognizance under the circumstances. No mention is made of the clerk's taking a recognizance, and he is, therefore, without authority to do so, and any recognizance which he might purport to take would be void. *State v. Caldwell*, 124 Mo. 509, 28 S.W. 4; *State ex rel. v. Fraser*, 165 Mo. 242, 65 S.W. 569.

The sheriff is authorized under Section 3965 to take bail when the amount has been fixed by the magistrate and endorsed on the warrant of commitment. (See *State v. Holt*, 234 Mo. 598, 137 S.W. 877), but no provision has been made for the clerk's doing so. Once, however, the information has been

Hon. Robert C. Frith,

-3-

filed where the person is in custody or under arrest, Section 3962 becomes applicable. Under that section the clerk is authorized to fix amount of bail and to take the bond or recognizance, if the court is not in session. The clerk's authority is limited to cases where the court is not in session, and the record of his action must show that such was the case. State v. Woodward, 159 Mo. 680, 60 S.W. 1042.

CONCLUSION.

The clerk of the circuit court may fix bail and take a bond or recognizance where the defendant is under arrest or in custody after an information or indictment has been filed, and when court is not in session.

Respectfully submitted

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J.B.*

RRW/LD

OFFICERS: Circuit Clerk and Ex-officio Recorder entitled to
SALARIES: additional compensation provided in Senate Bills
247 and 274, 64th General Assembly.

June 24, 1948



Honorable Robert D. Frith
Prosecuting Attorney
Livingston County
Chillicothe, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our Circuit Clerk and Ex officio Recorder of Deeds informs me that Senate Bill No. 247 and Senate Bill No. 274 have been passed by the General Assembly and signed by the Governor. He and the County Court requested an opinion from me as to when these bills become effective and as to when the salary increase shall be due and payable to him.

"I would appreciate your opinion on this."

Senate Bill No. 247, 64th General Assembly, was truly agreed to and finally passed, and sent to the Governor on April 19, 1948. Senate Bill No. 274, 64th General Assembly, was truly agreed to and finally passed, and sent to the Governor on March 18, 1948. Both bills were approved by the Governor in due time.

Section 29 of Article 3 of the Constitution of Missouri of 1945, provides that "If the General Assembly recesses for thirty days or more, it may prescribe, by joint resolution, that laws previously passed and not effective shall take effect ninety days from the beginning of such recess." The 64th General Assembly did recess for a period beginning April 19, 1948, and ending May 20, 1948. Before such recess, both houses approved a resolution providing that all laws passed on or before April 19, 1948, and not effective shall take effect on July 18, 1948 (Senate Journal, p. 1937). Senate Bills Nos. 247 and 274 are covered by that resolution and, therefore, will become effective on July 18, 1948.

Honorable Robert C. Frith

There is the additional question of whether or not the present holder of the office of circuit clerk and ex-officio recorder is entitled to receive the compensation provided by these bills. Section 13 of Article 7, Constitution of Missouri, 1945, contains the following provision "the compensation of state, county and municipal officers shall not be increased during the term of office, nor shall the term of any office be extended". An identical provision was found in Section 8 of Article 14 of the 1875 Constitution. That provision was considered by the courts of this state on several occasions and they uniformly held that, where additional duties are imposed upon an officer, the constitutional provision referred to does not prevent his receiving additional compensation for such additional duties. (See Harvey v. Sheehan, 269 Mo. 421, 190 S.W. 864.)

Do these bills impose additional duties upon the circuit clerk and ex-officio recorder in counties of the third class? Senate Bill No. 247 contains the following provision:

"Section 6a. The circuit clerk and recorder in counties of the Third Class, wherein the offices shall have been combined, as recorder of the county, shall in addition to other duties imposed upon him by law, have the additional responsibility to prepare and keep a separate alphabetical list of the names of all residents of the county who have been discharged from the Armed Forces of the United States, which list shall show such veteran's name, post office address, and the branch of service from which he was discharged, the date of his discharge and the date of the recording of same, together with the book and page wherein such discharge is so recorded, which list shall be maintained by the recorder for public inspection and shall be up to date at all times; and in addition thereto, said recorders in the said counties shall have the additional responsibility of furnishing to all persons who have so reported their discharge from the Armed Forces of the United States one certified copy of such discharge upon request of such veteran, or if such veteran shall have deceased since the recording thereof, then by his heir, executor or administrator. For each name which the recorder shall append to

Honorable Robert C. Frith

the aforesaid alphabetical list, and for each certified copy of such discharge as he shall furnish, the said recorder shall receive the sum of fifty cents, to be paid out of the county treasury, which fees shall not be deemed to be accountable fees within the meaning of Section 3 of this act:".

In the absence of Senate Bill No. 247, the officer in question in such counties was not required to maintain an alphabetical list of discharged service men. He was required to record, without fee or compensation, discharges from the armed forces (Laws, 1943) p. 643), but there was no requirement that an alphabetical list containing the information required in Senate Bill 247 be maintained.

Section 15077, R. S. Mo. 1939, provides that whenever a certified copy of a public record is required to perfect the claim of a service man for a United States pension or other claim upon the government of the United States the custodian of the records shall supply such certified copy without any fee or compensation. However, Section Bill 247 requires the recorder to furnish a certified copy of discharge, upon request, without regard for the reason therefor. Consequently we are of the opinion that Senate Bill No. 247 does impose additional duties upon the circuit clerk and ex-officio recorder.

Senate Bill No. 274 provides a new method for the selection of grand and petit jurors in counties of the third and fourth classes. Heretofore such jurors were chosen by the county court, and the circuit clerk had no duties in connection therewith. (Sec. 705-711 R. S. Mo. 1939). Senate Bill No. 274 provides for their selection by a board of jury commissioners. Section 704-A of the bill reads as follows:

"In each county of the third and fourth class the clerk of the circuit court and the judges of the county court together with the circuit judge as provided in Section 13394, Revised Statutes of Missouri, 1939, a majority of whom shall constitute a quorum for the transaction of business, shall constitute a board of jury commissioners for their respective counties. The clerk of the circuit court of such counties shall be ex-officio clerk of the board of jury commissioners, and his duty shall be to assist the board in the performance of the

Honorable Robert C. Frith

clerical part of their work, and such clerk shall perform such other duties and services as may be required of him by the board or any member thereof, with respect to the things to be done by the board of jury commissioners, as provided by law. The time, place and manner of meetings of the board, and rules for performing its duties shall be fixed by the board."

Section 717 of the bill provides that the circuit clerk shall receive as additional compensation for those duties the sum of three hundred dollars per year in third class counties, and one hundred fifty dollars per year in fourth class counties. Inasmuch as his duties in this capacity are new and additional ones, the present holders of the office in counties of those classes are entitled to receive such compensation, beginning on the effective date of such Act.

CONCLUSION

Therefore, we are of the opinion that, beginning on the effective date of Senate Bills No. 247 and No. 274, to-wit, July 18, 1948, the circuit clerk and recorder now holding said office in counties of the third class, where such offices have been combined, will be entitled to receive the additional compensation provided in said Acts.

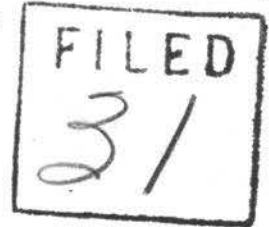
Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Counties may not exact a gasoline tax in the absence
of specific legislation authorizing same.
COUNTIES:



November 17, 1948

11-17
Honorable W. C. Frank
Prosecuting Attorney
Adair County
Kirksville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"On November 19, the County Judges of the sixteen counties comprising the First Congressional District, are going to hold a meeting in the Court House here in Kirksville, for the purpose of discussing the possibility of the several counties calling an election and voting a gasoline tax for road purposes.

"The Adair County Court asked me to write you for an official opinion advising them whether or not the several counties could so vote such tax and if so, how much the tax could be voted for.

"If you can favor them with this opinion, it will be greatly appreciated."

The law is well established in this state that a county can only exercise the taxing power when authorized to do so by an act of the Legislature. Article X, Section 1, Constitution of Missouri 1945, reads:

"The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes."

Article X, Section 4(a), of the Constitution of Missouri 1945, places all property within three classifications, and concludes that nothing in said section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or other taxes of the same or different types, and reads:

"All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within Classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence or business of the owner, or the amount owned. Nothing in this section shall prevent the taxing of franchises, privileges or incomes, or the levying of excise or motor vehicle license taxes, or any other taxes of the same or different types."

Furthermore, Section 11(f), Article X, Constitution of Missouri 1945, provides that nothing in this Constitution shall prevent any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes, and reads:

"Nothing in this Constitution shall prevent the enactment of any general law permitting any county or other political subdivision to levy taxes other than ad valorem taxes for its essential purposes."

The two above constitutional amendments clearly indicate that counties may exact a gasoline tax, providing legislation implementing said constitutional provision is enacted by the general assembly, and only in such case may such taxes be collected by the county.

Apparently you have in mind several counties joining together under Section 16, Article VI, of the Constitution of Missouri 1945, which reads:

"Any municipality or political subdivision of this state may contract and cooperate with other municipalities or political subdivisions thereof, or with other states or their municipalities or political subdivisions, or with the United States, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service, in the manner provided by law."

Furthermore, the 63rd General Assembly enacted legislation which will permit municipalities and political subdivisions of the state to exercise authority granted under and by virtue of Section 16, Article VI, supra. (See page 1395, Laws of Missouri 1945.) However, notwithstanding the adoption of Section 16, Article VI, supra, and enactment of legislation passed by the 63rd General Assembly, page 1395, Laws of Missouri 1945, it is still essential that there be a specific act of the Legislature authorizing counties to exact a gasoline tax in their respective counties, and we fail to find wherein such legislation has ever been enacted.

CONCLUSION

Therefore, we must conclude that, in the absence of specific legislation authorizing counties to collect gasoline taxes, it cannot be done.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

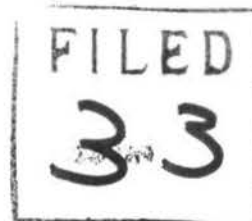
JTB

ARR:LR

CRIMINAL LAW:
MOTOR VEHICLES:

Under reciprocal provisions, a resident of Michigan may operate a motor vehicle for a period of 90 days in any 1 year without registering same with the Commissioner of Motor Vehicles.

February 18, 1948



Honorable D. W. Gilmore
Prosecuting Attorney
Scott County
Benton, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"The Highway Troopers in this County have arrested a man for driving his automobile with Michigan license tags on it. This man came to Missouri 8 months ago, and has been employed at Charleston, Mississippi County, in connection with the Veteran's Administration program--he is an instructor for some of those taking training under the Veteran's Adm. Educational Program. During this time he has had a room in Charleston, but his wife has maintained their home in the State of Michigan. He has made trips back to Michigan about once a month to visit his wife and children.

"An information has been filed under Sec. 8373 R. S. Mo., 1939. The defendant plead not guilty, and presumably relies on Section 8375 R. S. Mo., 1939. Counsel was appointed by the Magistrate, and the Magistrate requested that both sides agree on a continuance until your interpretation be obtained, and with the further idea in mind that it may be necessary to obtain the attitude of the Michigan authorities under the reciprocity arrangement provided for in Sec. 8375.

"Similar cases have come up frequently before, but the defendants have always plead guilty, paid a small fine, obtained Missouri

Honorable D. W. Gilmore

License tags, and--lived happily ever-afterwards, I guess. But since an issue has been made, we want to make a proper disposition of the matter in order that we might establish a precedent."

The facts stated in your request are analogous to the facts in another request for an opinion, which was rendered under date of October 30, 1947, to Colonel Hugh H. Waggoner, Superintendent of the Missouri State Highway Patrol, a copy of which we are enclosing.

The enclosed opinion holds that the owner of the motor vehicle in question is a non-resident, and in the absence of a reciprocal provision in the laws of the State of Kansas, exempting Missouri residents operating motor vehicles in that state under similar circumstances, that said non-resident operating his motor vehicle in this state must register said motor vehicle in Missouri. The same rule applies in the instant case. In view of the holding in the opinion herein referred to, the answer to your request depends upon whether the State of Michigan has enacted a reciprocal provision or other law exempting Missouri residents from registration while operating their motor vehicles in the State of Michigan under like circumstances.

The Laws of Michigan, 1937, created a board known as the Michigan Highway Reciprocity Board (see Section 422-1 of the Compiled Laws of Michigan, 1929, Vol. 5, Mason's 1940 Cumulative Supplement). Under Section 422-2 of the same Volume, we find where said board is authorized and empowered to enter into reciprocal compacts and agreements concerning the operation and regulation of automobiles engaged in international and interstate commerce. Section 422-3 of the same Volume provides what such compact shall grant residents of other states and contains a proviso that such compacts and agreements shall not supersede or suspend any laws, rules or regulations of the State of Michigan applying to motor vehicles operated intrastate in the State of Michigan. The foregoing laws of Michigan, granting reciprocity to owners of motor vehicles registered in this state, apply almost entirely to interstate commerce, and specifically provide that they do not affect laws, rules and regulations in that state that apply to motor vehicles operated intrastate in Michigan. We construe said provision to clearly defeat the possibility of such board executing any agreement with this state, thereby relieving residents of this state, while operating their motor vehicles in the State of Michigan, from registering same with the proper authorities in that state.

Under date of February 9, 1944, the Public Service Commission of this state, through its chairman and the Motor Vehicle Department

Honorable D. W. Gilmore

of this state by the Commissioner of Motor Vehicles, and the Michigan Highway Reciprocity Board, executed an agreement exempting said motor carriers, while operating in interstate and for hire of persons or property from registration, a copy of which we are attaching hereto. However, such agreement does not, in any manner, apply to motor vehicles operated by individuals for their own pleasure or business, and not operated for hire.

We find the following amendment in the Public Acts of Michigan, 1947, pages 198-199, which reads in part:

"(9.1504) Sec. 4 (b) It shall be unlawful for any non-resident whose home state or country does not require the licensing of operators or chauffeurs, and who has not been licensed either as an operator or chauffeur in his home state or country, to operate any motor vehicle upon any highway in this state without first making application for and obtaining a license as an operator or chauffeur as required under this act, except that any said unlicensed non-resident who is over the age of 17 years and who is the owner of a motor vehicle or private chauffeur or authorized driver of such owner which has been duly registered for the current calendar year in the state or country of which the owner is a resident, may operate such motor vehicle on the highways of this state for a period of not more than 90 days in any 1 year without making application for or obtaining an operator's or chauffeur's license under this act upon condition that the motor vehicle shall at all times display the license number plate or plates issued therefor in the home state or country of the owner and that the non-resident owner, chauffeur or driver has in his immediate possession a registration card evidencing such ownership and registration in his home state or country, or is able at any time or place required to prove lawful possession or the right to operate such motor vehicle and establish his proper identity."

which amendment allows non-residents to operate their motor vehicles in the State of Michigan for 90 days out of any one year, when said motor vehicles shall, at all times, display the license number plate issued therefor and the operator or owner of said motor vehicle has evidence of said ownership of said motor vehicle.

Honorable D. W. Gilmore

Section 8375, R. S. Mo. 1939, is known as the reciprocity provision in the Motor Vehicle Act of the State of Missouri, and it permits a non-resident owner to operate his motor vehicle within this state without registering same or paying any fee providing that similar privileges are granted residents of this state operating their motor vehicles within the state of the non-resident.

CONCLUSION

In view of Section 8375, supra, Laws of Missouri, and 9.1504, Section 4 (b), supra, Laws of Michigan, it is the opinion of this department that the person referred to in your request may operate his motor vehicle in this state for a period not to exceed 90 days in any one year without registering same with the Commissioner of Motor Vehicles of this state. Thereafter, it is necessary that he register said motor vehicle with said Commissioner of the State of Missouri.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

34
WORKMEN'S COMPENSATION:
SECOND INJURY FUND:

Second Injury Fund provided for in Section 3707, R. S. Mo. 1939, and amendments thereto, is liable for the payment of additional medical attention to an injured employee by special order of the Workmen's Compensation Commission, even though such employee is drawing regular payments from said Fund because of permanent total disability.

May 26, 1948

5-29
FILED

33

Honorable Spencer H. Givens
Director, Division of Workmen's Compensation
Jefferson City, Missouri

Dear Mr. Givens:

This will refer to your letter requesting the opinion of this department as to whether the Second Injury Fund provided for in Section 3707, R. S. Mo. 1939, as amended Laws Missouri 1943, page 1068, and Laws Missouri, 1945, page 1996 is liable for the payment of medical attention, as is provided for in the first paragraph of Section 3701, R. S. Mo. 1939, to an employee who is drawing regular payments from the Second Injury Fund for permanent total disability. Your letter is as follows:

"We respectfully request your opinion on the following problem:

"Is the Second Injury Fund liable for the payment of medical attention(as set forth in Section 3701a R. S. Mo. 1939) asked for by an employee who is drawing regular payments from the Fund as an adjudged permanent total disability case. The part of Section 3701a especially referred to is the phrase "and thereafter such additional similar treatment as the commission by special order may determine to be necessary."

"The third paragraph of Section 3707a (Second Injury Fund section) reads: 'The Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided for in this chapter for the payment of compensation.' Our Courts have repeatedly held (see 145 S.W.(2nd) 482, 145 SW(2nd) 506, 149 SW(2nd) 429) that medical attention is compensation on account of injury.

"It appears to me, therefore, that the Second Injury Fund would be liable (upon proper claim and proof of necessity therefor) for additional medical treatment provided a claimant drawing weekly payments from the Second Injury Fund."

Section 3701, of the Workmen's Compensation Act of Missouri, in paragraph 1 reads, in part, as follows:

"In addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment including nursing, ambulance and medicine, as may reasonably be required for the first ninety days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount of sum of seven hundred and fifty dollars, and thereafter such additional similar treatment as the commission by special order may determine to be necessary.

The Supreme Court and the Courts of Appeals of this state have, as you state, frequently held that medical attention is compensation, in like manner as money is compensation, to an injured employee under the Workmen's Compensation Act. This is the well-settled law of this state, established both by our compensation statutes and the decisions of our highest courts.

The Supreme Court, in the case of Wheeler vs. Mo. Pac. Rd. Co., 328 Mo. Rep. 888, had that question before it in the decision rendered by the Court. On this identical question, the Court, l.c. 893, said:

"Compensation is sought in this case under the provisions of Section 17 of the Workmen's Compensation Act, which provides for compensation for the "complete loss of the sight of one eye" as a permanent partial disability. However, the act provides for other character of compensation; Section 13 of the act provides compensation in the way of medical aid, * * *"

Our Supreme Court had the construction of Section 3311, R. S. Mo. 1929, before it in the case of McEneny vs. S. S. Kresge Co., 333 Mo. Rep. 817, on this same question. The Supreme Court quoting from a court of appeals opinion, l.c. 824, said:

"Thus it will be seen that Section 3311 specifically provides that medical treatment shall be considered as a part of the compensation the employee shall receive * * *."

The case of Parker vs. St. Louis Car Co. was before the St. Louis Court of Appeals, reported in 145 S.W.(2d) 482. The case involved the precise question here being considered. The court in

its construction of the then numbered statute 3311, now 3701, holding that medical attention to an injured employee under the Act is compensation, l.c. 484, said:

"Section 3311(a), R. S. Mo. 1929, Mo. St. Ann. Sec. 3311(a), p. 8246, provides that 'in addition to all other compensation, the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment * * * as may reasonably be required for the first ninety days after the injury or disability, to cure and relieve from the effects of the injury, not exceeding in amount of sum of seven hundred and fifty dollars, and thereafter such additional similar treatment as the commission by special order may determine to be necessary.'

"(1) It will thus be seen that the Workmen's Compensation Law provides not only for money compensation to be paid by the employer to the employee for injuries sustained, but that the employee is entitled to have medical aid furnished to him by his employer. The right to such medical aid is a part of the employee's 'compensation' given to him by the plain and clear provisions of the law itself, because the language used in said section, namely, 'in addition to all other compensation' has the effect of classifying such medical aid as 'compensation' on account of the injury.* * *"

There are numerous other decisions by our Appellate Courts on this question. The following are among them: Reeves v. Engineering Co., 237 Mo. App. 473; Brollier vs. Alstine, 236 Mo. App., 1233; and Mussler vs. Am. Car and Foundry Co., 149 S.W.(2d) 429.

Supplementing the provisions of Section 3701 requiring medical treatment for the employee by the employer for the first ninety days after an injury or disability, the Legislature provided this: "And thereafter such additional similar treatment as the Commission by special order may determine to be necessary."

A special order by the Commission for such additional medical treatment for the employee is provided for in Section 3701. This provision requiring such special order to be necessary was upheld in the case of Johnson v. Kruckemeyer et al., reported in 29 S.W. (2) 730. The St. Louis Court of Appeals in its decision, l.c. 734, said:

"In other words, if the injured employee at any stage of the case sees fit to incur additional expense, or to have a change in the identity of the service, and desires to have the same charged against his employer, it is necessary that he procure a special order therefor from the commission, such special order to be made before the expense is incurred or the change made, and not afterwards. We say this for the reason that the Act speaks of additional treatment which the commission by special order may determine 'to be necessary,' and not 'to have been necessary,' and does not contemplate that an award may be subsequently entered so as to be retroactive, and have the effect of relating back to the time when it was first found that additional treatment would be required. State ex rel. v. District Court, 134 Minn. 16, 158 N.W. 713, L.R.A. 1916F, 957."

The Second Injury Fund is made up of contributions, by employers coming under the Compensation Act, of \$500.00 from each employer subject to the Act, for every fatal injury by accident where death benefits would be payable under the Act, but sustained by an employee having no dependents, and the sum of \$100.00 in cases not resulting in death but where the employee sustains the loss of the use of an eye, a foot, a leg, an arm, or a hand in addition to the compensation provided otherwise in the Act. While the Fund bears the name of the Second Injury Fund, the statute creating the fund is a compensation statute and the Fund itself is a compensation fund.

The Second Injury Fund was created by the Legislature by House Bill 226 which provided for the repeal of Section 3707, Chapter 29, R. S. Mo. 1939, and the reenactment of a new section in lieu thereof to be also numbered Section 3707, Laws Missouri 1943, page 1068. The repealing and reenacting section, which is Section 1, of said House Bill 226, states, in part, as the reason for the creation of the Second Injury Fund that it should be "* * * for payments of compensation out of said Fund for permanent total disability when it results from disability and subsequent injury; for appropriations of the Second Injury Fund for the payment of compensation provided in this section; * * *". The background for the creation of the Second Injury Fund is revealed by the provisions previously expressed in Section 3706, R. S. Mo. 1939, casting upon an individual employer the obligation to pay all compensation due his employees for one or more injuries out of his own funds. In order to relieve the employer of at least a part of the compensation for which he might be liable for the last injury where there may be a second injury the Second Injury Fund was created, with the required contributions as above stated.

The Second Injury Fund statute was amended in Laws Missouri, 1945, page 1998. From the enactment of the second Injury Fund statute in 1943, including the said amendment in 1945, the Legislature has maintained and preserved the express provision that the Second Injury Fund shall be a compensation Fund.

On page 1069, Laws 1943, in the original Act--H.B. 226--in the second paragraph, in providing for the administration of the contributions to be made by the employers as hereinabove noted, the Act reads: "* * *such payments shall be placed in a fund to be known as the Second Injury Fund, which Fund is hereby appropriated by the Legislature in accordance with the law, exclusively for the payment of compensation as provided herein,* * *". The last quoted provision from Laws Missouri, 1943, page 1069 is repeated word for word in Laws Missouri 1945, page 1998, near the end of the page, and will therefore not be repeated here. The last paragraph of the new Section 3707, page 1998, Laws Missouri, 1945, has the following provision, to-wit: "The Commission shall direct the distribution of said Second Injury Fund in the manner and amounts provided for in this chapter for the payment of compensation." (underscoring ours).

The whole plan of the Compensation Act, from the beginning, including the succeeding amendments of every nature, is included in Chapter 29 of the Revised Statutes of this state.

The payment of all compensation of any nature must be made under said Chapter 29. If this be so, and it is, when the Legislature said in Section 3707 that the Commission should direct the distribution of the Second Injury Fund in the manner and amounts provided for in "this Chapter" for the payment of compensation, they thereby authorized the payment out of the Second Injury Fund for additional services to an injured employee determined to be necessary by special order of the Commission. This, too, even though the employee, entitled to such additional medical attention, may be at the time drawing regular payments from said Fund because of total disability previously determined. We believe that the Second Injury Fund being by law designated to be a compensation fund, The Workmen's Compensation Commission may distribute the fund or any part of it to the satisfaction of any element of compensation that the statutes decree to be due to an injured employee, for additional medical attention.

CONCLUSION

It is, therefore, the opinion of this department that the Second Injury Fund, as provided for in Section 3707, R. S. Mo.

Hon. Spencer H. Givens

-6-


and amendments thereto, is liable for the payment of additional medical attention, as provided for in Section 3701(a) R. S. Mo. 1939, determined to be necessary by special order of the Commission to an injured employee who is drawing regular payments from the Fund because of permanent total disability previously adjudged, and that the Commission is by law empowered to so direct the distribution of said fund.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

GWC:mw

APPROVED:

J. E. TAYLOR 
Attorney General

INHERITANCE TAX: Proceeds of pension under the provisions of the
EXEMPTIONS : Federal Retirement Act are exempt from
inheritance tax.

June 10, 1948

FILED
33

Honorable C. H. Gillilan,
Assistant Supervisor
Inheritance Tax Division
Department of Revenue,
Jefferson City, Missouri

Dear Sir:

We have your letter of May 6, 1948, in which you request an opinion of this department. Your letter is as follows:

"I am enclosing self-explanatory letter this day received from Mr. James R. Anderson, Inheritance Tax Appraiser in the above estate.

"You will note the payment to decedent's estate was in effect merely a refund of the amount paid into the retirement fund by the decedent and represents no additional benefits accruing under the Retirement Act. It appears the decedent made a lump sum payment of the amount necessary to qualify himself for full retirement benefits under the provisions of the Retirement Act.

"There has been expressed various opinions as to the practical application of the provisions of Section 571, R.S. 1939 as amended Laws of Missouri, 1941, pages 280-281, relative to various forms of retirement benefits. My own view has been that the purpose of the amendment was to benefit employees, or the families of employees, and that all should stand on an equal footing, as far as tax exemption is concerned, regardless of the method and time of payment of the necessary assessments.

"For our guidance in this matter, we shall appreciate an official opinion relative to the general application of the aforesaid amended section.

"Trusting we may have this opinion at an early date, I remain, .

Section 571, R.S.A.Mo. 1939, contains the following proviso:

"* * *and provided further that nothing herein shall be construed as imposing a tax upon any transfer as defined in this act, on a trust or on any distributee thereof, created as a part of a stock bonus plan, pension plan, disability or death benefit plan, or profit sharing plan for the exclusive benefit of employees to which contributions are made by an employer or employees, or both, for the purpose of distributing, in accordance with such plans, the earnings or principal, or both the earnings and principal, of the trust fund."

The specific question for consideration in your inquiry is whether or not the subjection of the \$2745.37, payment from the Civil Service Retirement Fund to Mr. Cochran's estate, to an inheritance tax would amount to the imposing of a tax upon a distributee of a trust, which trust was created as a part of a pension plan or a disability plan for the exclusive benefit of employees, which plan was contributed to by either the employee or the employer, or by both. In answer to this question, we suggest the fact that the plan set up by the Federal Civil Service Retirement Act, Title 5, Chapter 14, U.S.C.A., and more particularly Title 5, Section 719, is a plan whereby the employee contributes a portion of his salary to the Retirement Fund and the fund is used for paying annuities to the employee from and after his retirement, Title 5, Section 691, U.S.C.A., and for paying annuities in case of disability. Title 5, Section 724, U.S.C.A.

Although the aforesaid Federal Statute does not specifically apply the term "trustee" to the Secretary of the Treasury and the Commissioner of Pensions, the officers charged with the duty of administering this retirement fund, they or the U.S. Government are trustees by operation of law, because they administer this fund for the purpose of paying the annuities. The persons to whom these annuities are paid are distributees of the trust.

Title 5, Section 693-1 brought members of Congress within the provisions of the Retirement Act, above discussed. Mr. Cochran, according to the correspondence before us, availed himself of the benefit of the plan by contributing the sum required to render him eligible for the disability annuity, which sum amounts to the figure of \$2745.37 above set forth. However, Mr. Cochran died before he received any payments under the annuity plan.

Title 5, Section 724, Subdivision C, provides as follows:

"In case an annuitant shall die without having received any annuities purchased by the employee's contributions, as provided in (2) of Section 698 of this title, an amount equal to the total amount of his credit at time of retirement, the amount remaining to his credit and any accrued annuity shall be paid upon the establishment of a valid claim therefor in the following order of precedence:

"1. To the beneficiary or beneficiaries designated in writing by such annuitant and recorded on his individual account;

"2. If there be no such beneficiaries, to the duly appointed executor or administrator of the estate of such annuitant;

"3. If there be no such beneficiary or executor or administrator, payment may be made, after the expiration of thirty days from the date of the death of the annuitant, to such person or persons as may appear in the judgment of the Civil Service Commission to be legally entitled thereto, and such payment shall be a bar to recovery by any other person."

It was undoubtedly under the authority of the last-quoted section that the Retirement Fund paid the above-mentioned sum to Mr. Cochran's estate. We are of the opinion that the executor or administrator of the estate of a deceased person when paid either the difference between what the deceased contributed to the Retirement Fund and the total annuity received by the deceased in his lifetime, or, in case he had received no annuity in his lifetime, the full amount that he had contributed receives that payment by reason of the provision of Title 5, Section 724, supra, to the effect that it shall be paid to the executor or administrator, and that such executor or administrator is therefore a distributee of the Retirement Fund in his representative capacity, within the meaning of the provision of Section 571, R.S.A. Mo. 1939, exempting distributees of a trust like the one set up by the Federal Retirement System from the inheritance tax. We believe this for the reason that the following words of the inheritance tax Act "* * * or any distributee thereof" are unqualified and that the comprehensiveness of the word "distributee" is enlarged by the use of the word "any".

We are of the further opinion that since the executor or administrator acts only in a representative capacity, representing all of the persons having an interest in the estate, the heirs and devisees are also distributees of said trust fund and come within the meaning of the comprehensive term "any distributee" used in the inheritance tax section above quoted, and are exempt from the inheritance tax insofar as their respective distributive shares of said payment from said fund are concerned.

CONCLUSION

It is, therefore, our opinion that although Mr. Cochran never received a payment on the annuity, and although the sum above set forth, paid by the Retirement Fund to his estate since his death, represented the legal equivalent of his contribution to the fund, nevertheless it constituted a portion of a trust fund operated for the purpose of paying annuities to retired and disabled Federal employees, and was paid to his estate according to the specific provision of the statute which constitutes a part of a comprehensive plan for payment of annuities to such employees, and that therefore his executor or administrator, and also his heirs or devisees, are distributees of a trust, which trust was created for the purposes of effectuating a pension plan for the exclusive benefit of Federal employees within the meaning of the inheritance tax exemption provision above quoted from Sec. 571, R.S.A. Mo. 1939, and that, therefore, the sum of \$2745.37 paid by the Civil Service Retirement Fund to Mr. Cochran's estate is not subject to the inheritance tax.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

ELECTIONS: Where a person has duly filed for public office and within the proper time files a withdrawal of that candidacy, said person cannot subsequently file a withdrawal of the withdrawal.

June 10, 1948

Honorable James Glenn
Prosecuting Attorney
Macon, Missouri



Dear Sir:

Your opinion request reads as follows:

"I have been requested to obtain your opinion on the following point of law.

"Prior to the final date for filing for public office, one Henry C. Carter, duly filed for the office of Judge of the Northern District of the county court on the Democrat ticket. After the final date had expired, Mr. Carter filed with the clerk of the county court notice of his withdrawal as a candidate for said office. For your information a copy of the withdrawal of Mr. Carter's is enclosed herewith.

"At the present time, Mr. Carter seeks to withdraw his withdrawal and have his name on the ballot for said office in the August primary.

"Your opinion is requested as to whether Mr. Carter can at this date file for the office from which he has previously withdrawn."

As we understand your letter, a person has properly and legally filed for office prior to the final date of filing for same pursuant to Section 11550, Laws of Missouri 1944, Ex. Sess., page 24, Section 1. This section provides the form of the declaration to be used by a candidate for office in the primary elections in this state. Subsequent to this filing, the person filed with the Clerk of the County Court a notice of his withdrawal as a candidate for the office previously filed for. This withdrawal was in compliance with Section 11544, R.S. Mo. 1939, and complies with

Honorable James Glenn

the requirements set out therein. At this date, it is asked whether or not the person who had filed for office and then withdrawn may now withdraw his withdrawal. There is no statutory authority in the State of Missouri specifically providing for such a procedure. We have been unable to find but one other case that deals with this problem. In C.J.S., Vol. 29, page 130, Section 95, it provides as follows:

"Withdrawal of withdrawal. In the absence of statutory authority a candidate who has effectively withdrawn his candidacy prior to the primaries is not entitled to withdraw his withdrawal."

The case set out in annotation in support of the above quoted statement is *Brower et al. v. State, ex rel. Ritz*, 13 Ohio App. Rep. 259. In that case the court was asked to mandamus the board of Deputy State Supervisors of Elections to print the relator's name upon the official primary ballot. The facts were that the relator had duly filed his declaration of candidacy. On June 26 the relator filed with the board a withdrawal of his candidacy. On June 28 this withdrawal was accepted. On June 29 the relator filed a withdrawal of his withdrawal of candidacy. The court, in passing upon the effect of these actions by the relator, held, l.c. 261:

"The statute does not expressly or by inference recognize a withdrawal of a withdrawal of candidacy. Consequently the law imposes no duty upon such Board of Deputy State Supervisors of Elections with respect thereto. Under the well established law governing proceedings in mandamus, such board cannot therefore be compelled to act where the statute imposes no duty."

In view of this decision and by reason of the fact that there is no Missouri statute which expressly or by inference recognizes a withdrawal of a withdrawal of candidacy, and assuming the validity of the actions in your particular case, we must conclude the following:

Honorable James Glenn

CONCLUSION

Where a person has duly filed for public office and within the proper time files a withdrawal of that candidacy, said person cannot subsequently file a withdrawal of the withdrawal.

Respectfully submitted,

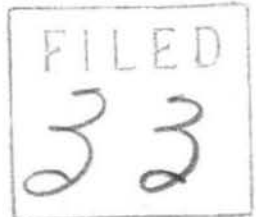
WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WORKMEN'S COMPENSATION: An employer, under the terms of Section 3707, Laws of Missouri, 1945, page 1998, must pay the sum of \$100.00 into the Second Injury Fund, where an employee suffers the total, permanent loss of the use of an eye, resulting from two accidental injuries.

June 29, 1948



Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Mr. Givens:

This will acknowledge your request to this Department, for an opinion construing Section 3707, Article 2, Chapter 29, R.S. Mo. 1939, as re-enacted, Laws of Missouri, 1945, page 1996, l.c. 1998, with respect to the payment by an employer of the sum of one hundred dollars (\$100.00) into the Second Injury Fund, upon the total, permanent loss of the use of, an eye, a foot, a leg, an arm or a hand by an employee, for the total or permanent loss of the use of any such member.

Your letter states that your Department is considering a case where an employee has lost the total and permanent vision and use of one eye. The facts, as you state them, reveal that the employee by reason of a previous injury suffered the loss of 12% of the use of one eye, and that by a subsequent second injury, the employee has suffered, and does now suffer, 88% loss of the vision and use of the same eye.

Your letter is as follows:

"In connection with the Second Injury Fund provision of the Missouri Workmen's Compensation Law (Section 3707, Revised Statutes of Missouri, 1939), I ask your opinion on the following problem:

"Should the payment of \$100 into the Fund be requested in the case of an employee who has lost 88 per cent of the vision of an eye due to an accidental injury, the 12 per cent loss

of vision having been sustained previous to the injury in question.

"I am concerned because the section covering the Second Injury Fund seems to limit payments only to when the resultant injury is 'total, permanent loss of use of' the members listed due to any one accident. On the hypothetical case above, on which my question is premised, the fact is that the employee has completely lost the sight of one eye and is, therefore, a potential permanent total disability (considering the fact his other eye might be lost). This is the type of case that the Second Injury Fund is set up to take care of. Apparently, however, in spite of this fact a contribution into the Fund is not indicated.

"As I view it, there may be one of three conclusions: (1) no payment due at all; (2) total payment of \$100; (3) payment on a pro rata basis, i.e., 88 per cent of \$100 or \$88. "

Your difficulty appears to be that you assume, under the terms and meaning of said Section 3707, the total and permanent loss of one eye by this employee must have been the result of one accident before the employer may be required to pay the said sum of one hundred dollars (\$100.00) for the Second Injury Fund mentioned in said Section 3707.

Section 3707, R.S. Mo. 1939, Laws of Missouri, 1945, page 1996, l.c. 1998, states, in part, the following:

"(a) All cases of permanent disability where there has been previous disability shall be compensated as herein provided.
* * * "

We thus observe that in the first sentence of Section 3707, which we may very appropriately denominate

the "Second Injury Fund Statute", the Legislature designed and effected its intent to provide compensation for cases of permanent disability coming under the Second Injury Fund Statute, and that to effect such event there must have been a previous injury. It is conceivable of course that a total, permanent loss of the use of any member named in the statute might result from one accident, but if so, it could not come within the terms of the Second Injury Fund Statute, either as to the payment of compensation to the employee, or as to the payment of the one hundred dollars (\$100.00) by an employer for the benefit of said fund on account of it being a total, permanent loss of the use of such member. The Second Injury Fund Statute and its full conditions and terms are necessarily based upon there having been a previous injury.

Section 3707, Laws of Missouri, 1943, page 1068, as a re-enactment of Section 3707, R.S. Mo. 1939, repealed, does not say, nor does the present enactment of Section 3707, Laws of Missouri, 1945, l.c. 1998, say that the "Total, permanent loss of the use of" the member named must be due to any one accident, as presupposed in your letter. That part of said Section 3707 covering the subject upon which your request for this opinion is based, requiring the payment of the sum of one hundred dollars (\$100.00) for the Second Injury Fund, states:

"* * * Every employer in every case of total, permanent loss of the use of, one eye, one foot, one leg, one arm, or one hand, in addition to the compensation as provided for in this act shall pay into the Second Injury Fund provided for herein, the sum of one hundred dollars for the total or permanent loss of the use of any such member; * * *".

This presupposes, and in fact conclusively demands, when read in connection with the first sentence of Section 3707 above quoted, that there must be a second injury, in order to constitute a "total, permanent loss of the use of" any such member before the payment of one hundred dollars (\$100.00) is required.

You state very clearly in your letter that the employee in the case being considered has sustained a total, permanent loss of the use of one eye due to two accidents,

in the first of which he suffered a loss of 12% of the vision of his eye and in the second injury he has suffered the loss of 88% of the vision of the same eye, the two constituting a total, permanent 100% loss of the use of the eye. This, we believe, makes a conclusive state of facts, under said Section 3707, requiring the payment by the employer of the sum of one hundred dollars (\$100.00) for the Second Injury Fund.

We note in your letter that you seem to fear that there could only be a total, permanent disability here in the event the employee mentioned should lose the vision of his other eye. We think you should not be concerned about such a possible state of facts. If the employee should lose his other eye, it might involve many other conditions than those involved here, upon, perhaps, an entirely different injury, and, indeed, the application of another statute than the one being here considered.

Here, however, we do have a total, permanent loss of the use of "one eye" by the employee as the result of two accidents. That is sufficient, and all that is necessary, under said Section 3707, to require the employer to pay the sum of one hundred dollars (\$100.00) for the Second Injury Fund.

We also note in your letter that you believe there might be a total payment of less than one hundred dollars (\$100.00) upon the determination and finding of fact that an employee has suffered a percentage of loss of a member mentioned in the statute of less than 100%. Said Section 3707 does not provide for any percentage payment of less than one hundred dollars (\$100.00), nor does it provide for the payment of any sum by an employer into the Second Injury Fund by the employer unless the loss of the use of one of the members mentioned in said Section 3707 be a total or permanent disability.

The Appellate Courts of this State have in many decisions held that the compensation laws of this State shall be liberally construed. Our Springfield Court of Appeals in the case of Daugherty vs. City of Monett, et al., 192 S.W. (2d) 51, l.c. 55, on that question said:

"* * * Compensation laws must be given a liberal construction in favor of the employee. * * *".

Our St. Louis Court of Appeals in the case of Ries vs. Plumbing Co., 186 S.W. (2d) 488, l.c. 489, on the question of the principles to be considered in the construction of compensation laws, said:

"* * * and the further principle that the law should be liberally construed with a view to the public welfare."

The Workmen's Compensation Laws of this State are designed to relieve an injured employee of the burden and necessity of bearing the cost and consequences of disability caused to employees by reason of accidental injuries suffered by them while in the course of their employment, and to place the burden of compensation therefor upon industry. The Second Injury Fund as provided for in said Section 3707 is a permanent fund made up of payments by employers under certain conditions fixed by said Section 3707, to be held in the custody of the State Treasurer of this State, and as compensation to be distributed by the Compensation Commission under justifiable and lawful conditions of fact. These laws have become, and are, representative of the public policy of this State, in regard to Workmen's Compensation, and are to be liberally construed to effectuate the intent of the Legislature in passing such laws.

Said Section 3707 prescribes the basic facts upon which the payment of the named sums into the Second Injury Fund shall be made by employers. One is that, when the total, permanent loss of the use of any one member named therein shall be suffered by an employee from a second injury, his employer shall pay into the Second Injury Fund the sum of one hundred dollars (\$100.00) for such total or permanent loss of the use of such member. This, we believe, is that sort of case.

CONCLUSION

It is, therefore, the opinion of this Department that an employer must pay the sum of one hundred dollars (\$100.00) into the Second Injury Fund, as provided in Section 3707, Laws of Missouri, 1945, page 1998, for the total or permanent loss of the use of any such member, where an employee suffers the total, permanent loss of the use of an eye, such employee having lost 12% of the vision

Honorable Spencer H. Givens -6-

of an eye by a previous accidental injury, and the loss of 88% of the vision of the same eye by reason of a second accidental injury.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

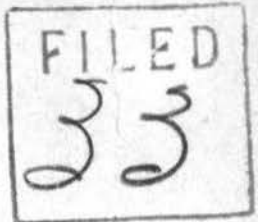
APPROVED:

J. E. TAYLOR
Attorney General

GWC:lr

EXTRADITION: Sheriffs may retain expenses incurred as a
SHERIFFS: messenger of the Governor in returning fugitive
from another state or territory.

August 2, 1948



8.5

Honorable Charles E. Ginn
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Mr. Ginn:

This is in reply to your request for an opinion, which
we will restate for the purpose of brevity:

Is the sheriff in a third class county
entitled to retain expenses incurred by
him in extradition cases?

This question has been previously answered in this office
concerning cases wherein the sheriff travels beyond the state
of Missouri for the purpose of returning to this state a person
who has waived extradition. In an opinion rendered to the
Honorable Herbert S. Brown, Prosecuting Attorney of Grundy
County, it was held that the sheriff could not be paid mileage
for travel beyond the state of Missouri.

In this opinion the question which will be considered
will be whether or not a sheriff who has been designated a
messenger by the Governor may retain the expenses incurred by
him in returning a fugitive from another state or territory.
Section 3976, R. S. Mo. 1939, provides:

"Whenever the governor of this state
shall demand a fugitive from justice
from the executive of another state or
territory, and shall have received no-
tice that such fugitive will be sur-
rendered, he shall issue his warrant,
under the seal of the state, to some
messenger, commanding him to receive
such fugitive and convey him to the
sheriff of the county in which the of-
fense was committed, or is by law
cognizable."

Section 3977, R. S. Mo. 1939, provides:

"The expenses which may accrue under the last section, being first ascertained to the satisfaction of the governor, shall, on his certificate, be allowed and paid out of the state treasury, as other demands against the state."

In the case of State ex rel. See v. Allen, 79 S. W. 164, 180 Mo. 27, See, a marshal of the Supreme Court, was designated as messenger by the Governor to return a fugitive from the State of Idaho. The court held that in that instance See was not acting in his capacity as marshal in going to Idaho and returning the fugitive, but was acting in the capacity of a messenger for the Governor. The court discussed the general proposition that the laws of the State of Missouri have no extraterritorial force so that when an officer, such as a marshal or sheriff, is without the state he has no authority to act in his capacity as such.

In Sections 13547.301-13547.308, Mo. R. S. A., there are to be found the provisions for the payment of the salary and compensation of sheriffs of third class counties. Section 13547.303 provides that the sheriff shall pay over to the county treasurer all fees arising in connection with the investigation, arrest, prosecution, etc., of persons accused of or convicted of a criminal offense.

Section 13, Article VI of the Constitution of 1945, provides that state and county officers charged with the investigation, arrest, prosecution, etc., of persons accused of or convicted of a criminal offense shall be compensated for their official services by salaries, and that all fees should be paid into the general revenue fund entitled to receive the same as provided by law.

From the principles enunciated and invoked in the above cases, it is clear that the sheriff is not acting in his official capacity when serving as a messenger of the Governor. Therefore, the expenses which he incurs when acting in that capacity should be paid to him and may be retained by him upon compliance with the provisions of Section 3977, supra.

Conclusion.

It is the opinion of this department that when a sheriff is acting as a messenger of the Governor in returning fugitives

Honorable Charles E. Ginn

-3-

from another state or territory he is entitled to expenses incurred and may retain the same upon compliance with Section 3977, R. S. Mo. 1939.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

OFFICE

Incumbent public officer entitled to retain office until successor elected or appointed and qualified.

September 24, 1948

FILED

33

9.29

Honorable R. M. Gifford
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Sir:

Reference is made to your letter requesting an official opinion of this office, reading as follows:

"During the year of 1940 a surveyor was elected and qualified in Sullivan County of the third class by virtue of Section 13190, R. S. Missouri 1939. At the general election in 1944 no person was nominated on any ticket and, therefore, no one was elected. The incumbent held over by terms of 13190 above cited.

"Page 1759, Laws Missouri, 1945, said Section 13190 was repealed and a new section of the same number was enacted.

"In the primary election of August, 1948, no person or persons were nominated for the office on any ticket and under our present laws such vacancies on the tickets cannot be filled. So no one will be elected county surveyor at the general election to be held in November, 1948, as provided by Section 13190, Laws of Missouri, 1945, page 1759.

"Such county surveyor is a member of the County Board of Equalization which office is rather important in itself.

"Will the present incumbent continue to hold over for a four year term beginning in January, 1949, or will the office be vacant?"

At the time of the election of the officer referred to in your letter of inquiry, there was in effect Section 13190, R. S. Mo. 1939, reading in part as follows:

"At the November election in the year 1868, and every four years thereafter, the qualified voters of each county shall elect some suitable person as county surveyor, who shall hold his office for four years, and until his successor is elected, commissioned and qualified. * * * * "

(Underscoring ours.)

Similarly, Section 5 of Article XIV of the Constitution of 1875 then provided:

"In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected or appointed and qualified."

Also Section 12820, R. S. Mo. 1939, reads as follows:

"All officers elected or appointed by the authority of the laws of this state shall hold their offices until their successors are elected or appointed, commissioned and qualified."

It is our thought that under the constitutional and statutory provisions quoted supra, the officer elected at the general election in 1940 was entitled to remain as the incumbent thereof until such time as his successor was duly elected and qualified. Such was the holding of the Supreme Court of Missouri in *Langston vs. Howell County*, 79 S.W. (2d) 99, 336 Mo. 444, wherein the court said, l.c. 102:

" * * * It is said in 46 C.J. p. 968:
'The general trend of decisions in this country is that, in the absence of an express or implied constitutional or statutory provision to the contrary an officer is entitled to hold his office until his successor is appointed or chosen and has qualified.' * * * * "

Further, in discussing the nature of such holding over, the court said, l.c. 102:

" * * * During the time an officer so holds over, under the provisions of the constitutional and statutory provisions, supra, he holds the office as a de jure officer (46 C.J. p. 969) and by the same tenure, after the prescribed term, until the right of his duly chosen and qualified successor attaches. * * * "

The constitutional and statutory provisions upon which such decision was predicated have been continued as Section 12 of Article VII of the Constitution of 1945, with Section 12820, R. S. Mo. 1939, remaining unchanged. It is noted that in your opinion request you refer to the repeal and re-enactment of Section 13190, R. S. Mo. 1939, by an act found in Laws of Missouri, 1945, page 1759. We do not believe that such repeal and re-enactment affects the opinion inasmuch as no new office was created and by further reason of the incorporation of the repeal and re-enactment bill of Section 13190a, reading as follows:

"In all counties of this state the terms of all persons holding the office of county surveyor at the time of the effective date of this act shall not be vacated, or otherwise affected thereby, and all the provisions of law relating to the office of surveyor shall remain in full force and effect for the period of the term of such persons holding the office of county surveyor at the time of the effective date of this act, unless otherwise provided by law. Otherwise the provisions of this article shall hereafter apply only to counties of Classes 2, 3 and 4."

CONCLUSION

In the premises, we are of the opinion that a county surveyor in a county of the third class, duly elected at the general election in 1940 and thereafter qualified and commissioned pursuant to such election, will remain in office until such time as his tenure is terminated by removal,

Hon. R. M. Gifford

-4-

resignation or the election and qualification of a successor.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB

WFB:VLM

DIVISION OF WORKMEN'S COMPENSATION

The Division of Workmen's
Compensation may, under Sec.
: 3727, R.S. Mo. 1939, adopt
: and enforce rules of procedure
: in the administration of the
: Compensation Act.

October 8, 1948



10-15
Honorable Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Director Givens:

This will acknowledge your letter requesting the opinion of this Department on the question of the validity of rules and regulations for the administration of the Workmen's Compensation Act, particularly Rule 3 of paragraph II of the Rules and Regulations adopted by your division, a set or copy of which rules you transmit with your letter.

Inasmuch as your letter submits two or three pertinent questions, we are copying the letter in this opinion. It follows:

"In connection with the authority given us in Section 3751, R.S. Mo. 1939, to '... make such rules and regulations as may be necessary...' to carry out '...all of the provisions of this chapter...' we are asking your opinion on the following:

"Rules and Regulations governing the Administration of the Missouri Workmen's Compensation Law were adopted by the Division of Workmen's Compensation July 7, 1948, (which are revised rules and regulations to take care of new amendments to the law effective July 18, 1948). They were approved the same day by the Industrial Commission, in compliance with the law (Laws of Missouri, 1945, Sec. 6(d) p.1103) and a certified copy was filed also the same day with the Secretary of State.

"We have attached for your convenience a printed copy of the Rules and Regulations above referred to, and direct your

attention (on page 5) to Rule No. 3 under the caption 'II. Contested Cases.' dealing with 'Failure to File Answer.'. Our questions are on this rule and are as follows:

- "1. The statute (Section 3727, R.S. Mo. 1939) provides for the filing of a claim, but the requirement for the filing of an answer is an administrative device of the Division of Workmen's Compensation to promote orderly procedure in the handling of litigated cases. It enables us to determine the actual issues in dispute.

"Question: Is the authority given us to adopt rules and regulations broad enough to enable us to establish the requirement for 'Answer to Claim for Compensation?'

- "2. To make Rule 3 effective, we have established a penalty for failure to file within the period, such penalty being that 'the statements in the claim for compensation shall be taken as admitted.'

"Question: Is the authority given us to adopt rules and regulations broad enough to enable us to establish this penalty and to enforce it?

- "3. If the answers to questions 1 and 2 are in the affirmative, can a referee enter a 'default judgment' by issuing an award of compensation on the claim alone; or should such witnesses as are available be heard?

- "4. Under the statute the Division has jurisdiction only when the employer and employee are under the Act. Is the allegation in the original claim

that employer and employee are under the Act sufficient, or must it be proved by evidence? And must the allegation be proved if the 'statements in the claim for compensation shall be taken as admitted' as provided in above quoted Rule 3 (assuming that said Rule 3 is valid)? Without proof that parties are under the Act, does the Division acquire jurisdiction?"

The particular question submitted in your request for this opinion is: If the authority given to your Department to adopt rules and regulations is broad enough to require an "Answer to Claim for Compensation", and if, in order to make such rule effective, you have the further right to provide that if the Answer is not filed within the period fixed by your rules you may provide that "the statements in the claim for compensation shall be taken as admitted."

Section 3751, R.S. Mo. 1939 of the Workmen's Compensation Act provides, in part, as follows:

"The commission and its members shall have such powers as may be necessary to carry out all the provisions of this chapter, and it may make such rules and regulations as may be necessary for any such purpose. * * * ."

Section 3764, R.S. Mo. 1939, as a part of said Act, is as follows:

"All of the provisions of this chapter shall be liberally construed with a view to the public welfare and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto."

Section 3727 of the Workmen's Compensation Act provides that an employee or his dependent, having a claim for compensation against his employer under the Act shall file a written claim within one year after the injury or death upon which the claim is made has occurred. There is no statute in the Compensation Act requiring an Answer to be filed. The intent and purpose of the Legislature, as it appears from Section 3723 of the Act is that, if an employee is injured in the course of his employment, and upon notice to the Commission, and notice to the employer, the Commission shall send to both employee and employer a form of agreement so that the matter could be compromised and settled without proceedings of any sort, a report of which is to be made to the Commission. However, if a controversy arises, then under Section 3727, the claim must be filed.

Section 3739, R.S. Mo. 1939, with respect to procedure before the Commission, is as follows:

"All proceedings before the commission or any commissioner shall be simple, informal and summary, and without regard to the technical rules of evidence, and no defect or irregularity therein shall invalidate the same. Except as herein otherwise provided, all such proceedings shall be according to such rules and regulations as may be adopted by the commission."

Section 3739 has been construed and interpreted by our Appellate Courts, in decisions hereinafter quoted, to mean that the procedure under the Compensation Act shall be in disregard and to the exclusion of the rules of formal procedure.

The authority granted by Section 3751 of the Compensation Act to the Commission to make such rules and regulations as may be necessary to carry out the provisions of the Act does not constitute a delegation of legislative power to the Commission, or conflict with the Constitution. Section 16 of Article IV of the Constitution authorizes the Legislature to pass laws permitting administrative agencies of the State to make such rules and regulations. Said Section 16 of Article IV is as follows:

"Filing of Administrative Rules and Regulations.--All rules and regulations of any board or other administrative agency of the executive department, except those relating to its organization and internal management, shall take effect not less than ten days after the filing thereof in the office of the secretary of state."

Returning again to the terms of Section 3739 and Section 3764, R.S. Mo. 1939, respecting the liberal construction of the Workmen's Compensation Act in favor of the employee, we find those sections construed and applied by the St. Louis Court of Appeals in the case of Vogt vs. Ford Motor Co., 138 S.W. (2d) 684. The Court in relation thereto, l.c. 686, said:

"* * * Under the Workmen's Compensation Act all proceedings before the Commission shall be simple, informal and summary. Section 3349, R.S. 1929, Mo. St. Ann. Sec. 3349, p. 8283. And all provisions shall be liberally construed with a view to the public welfare and a substantial compliance therewith shall be sufficient to give effect to rules, regulations, requirements, awards, orders or decisions of the Commission, and they shall not be declared inoperative, illegal or void for any omission of a technical nature in respect thereto. Section 3374, R.S. 1929, Mo. St. Ann. Sec. 3374, p. 8293. The very object and purpose of the entire act is that substantial rights are to be enforced at the sacrifice of procedural rights. * * * ."

The same construction upon the intent and purpose of the Legislature in passing the Act had been previously given by the St. Louis Court of Appeals in the case of Schrabauer vs. Schneider, 25 S.W. (2d) 529, where the Court, l.c. 535, said:

"In the positive legislative intent thus expressed throughout the act, there must have been a definite purpose in view, which we think undoubtedly was that, in the administration of

the law, 'procedural matters are to be treated as subsidiary in enforcing the substantive rights of the parties, and that a prima facie presumption is to be indulged in favor of the commission's jurisdiction in a case otherwise coming within the act. * * * ."

The authority then appears to be evident and conclusive that the Legislature was acting within its legislative powers under the Constitution to authorize the Workmen's Compensation Commission to promulgate such rules and regulations as it may find to be necessary to give effect to the whole of the Act. The rules in question were adopted by the Workmen's Compensation Commission and approved by the Industrial Commission of Missouri acting jointly under sub-section (d) of Section 6 of Senate Bill No. 246 creating the Department of Labor and Industrial Relations, and found in Laws of Missouri, 1945, page 1101, l.c. 1103. These rules are lawfully promulgated with the approval of the Industrial Commission of the State of Missouri, under sub-section (c) of Section 6 of said Senate Bill No. 246, Laws of Missouri, 1945, page 1101, l.c. 1103, under the terms of Section 3751, R.S. Mo. 1939.

There has been general approval in every jurisdiction, sofar as we are advised, by both text-writers and the Courts, of the power of boards or commissions under the Workmen's Compensation Acts of the different States to adopt and effectuate rules of procedure for the enforcement of such acts under legislative authority, and here in Missouri, as hereinabove noted, we have definite constitutional authority for the promulgation of such rules under said Section 16 of Article IV of the Constitution.

71 C.J. 922, 923, under the title of "Workmen's Compensation Act" states the following text:

"The board is authorized to make such orders as in its judgment may meet the ends of justice, and to promulgate reasonable rules of procedure relative to the exercise of its powers and authority for the protection of those who are injured, and also to protect the rights of the employer and of the insurance carrier, and to safeguard the state insurance fund. The rules, however, must be reasonable, and must not be inconsistent with the

workmen's compensation act or with other laws of the state, * * * ."

It will be noted that the text-writers and the Courts in discussing the authority of boards and commissions of administrative agencies of the State to make rules and regulations hold that they must be reasonable. Referring again to Rules 2 and 3 of the Rules and Regulations here being considered, providing that the employer and/or insurer shall file answer to the claim on Form 22 provided by the Commission, and that upon failure to file such answer within fifteen (15) days from the date of acknowledgment of the receipt of a claim by the Division, the statements in the Claim for Compensation shall be taken as admitted, seem to be entirely reasonable and unaffected with the denial of any right to anyone concerned. In this connection we think it well to have in mind what the authorities say with respect to the time in which answer shall be filed. 71 C.J. 1052 on the point states this text:

"Where a rule of the board requires special defenses to be pleaded a specified time before the hearing, a compliance with the rule is essential, * * * ."

There are numerous decisions from other States construing the power of boards or commissions administering Workmen's Compensation Acts to make and enforce rules respecting the filing of an answer, and to refuse to allow an answer to be filed out of time, and disallowing the introduction of evidence on any matter not made an issue by answer. The Appellate Court of the State of Indiana had this subject before it in the case of Freund et al. vs. Allen, reported in 184 N.E. 421. The Court in its decision, holding that where the rules of the Industrial Board (comparable to our Compensation Commission) requiring an answer to be filed within a certain time, and holding that the board acted within its lawful rights in refusing an answer to be filed out of time, 1.c. 423, said:

"Appellants Freunds did not offer to file their special answers as required by the rules of the Industrial Board, so there was not an abuse of discretion in refusing to allow them to be filed."

The same Appellate Court of Indiana in the case of Wright et al. vs. Keltner, 159 N.E. 433, on the same principle, 1.c. 434, said:

"The rule requiring special defenses to be filed prior to the day of the hearing is a wholesome rule and one of which appellant was required to take notice. There was no reversible error in the action of the board in refusing to hear evidence in support of the defense of willfulness and intoxication. * * * ."

The Supreme Court of Michigan had the same principle before it for discussion and decision construing rules such as we are considering here, in the case of Sharp vs. Trust Co., 236 N.W. 831. The Court, l.c. 832, said:

"* * * 'If the employer or insurer desires to deny liability an answer to the plaintiff's claim shall be filed with the Department in writing * * * .'
* * * 'The rule in question was within the power of the board to adopt. It is reasonable and valid; it not only binds the boards, and litigants before it, but it binds this court. Being reasonable and within the power of the board, this court must follow it, and recognize it in cases coming here for review.' * * * ."

None of the several States, decisions from the Appellate Courts of which are hereinabove noted, require by statute an answer to be filed in Workmen's Compensation cases. In this respect they are identical with the State of Missouri.

There is no decision from our Supreme Court or Courts of Appeals passing upon the validity of such a rule, with respect to an answer. Our Supreme Court, however, has expressed its views of the administration of the Workmen's Compensation Act in such language as to persuade us to believe that if and when the matter might come directly before the Court it would have sound authority upon which to rely on this question in the decisions hereinabove cited. In the case of Liechty vs. Bridge Co., 162 S.W. (2d) 275, the Court discussed our Compensation Act and gave its views upon the procedure to be followed by the Commission in making the Act effective. The Court, in its decision, l.c. 279, so expressing its views, said:

"* * * And, while it is true that the Commission cannot usurp judicial functions

contrary to the constitutional inhibition, it has those powers which are incidental and necessary to the proper discharge of its duties in administering the Compensation Act, Rev. St. 1939, Sec. 3689 et seq. (Mo. R.S.A. Sec. 3689 et seq.) and it frequently happens that a full discharge of those duties requires the Commission to determine questions of a purely legal nature, such as whether the employee was covered by the contract of insurance or whether the employee had received a compensable injury in the course of his employment; whether the alleged employee was an independent contractor or whether he was employed by an independent contractor rather than by the alleged employer. These and many other judicial questions, as far reaching as the question of law involved in this case, have uniformly been held to be proper questions for the Commission's determination in the proper administration of the Compensation Law. In fact, if the commission should be denied such power, it would practically be impossible for the Commission to perform its duty of administering the Act. * * * ."

Our Appellate Courts have said statutes with respect to the administration of the Compensation Act are to be liberally construed, especially respecting remedial or procedural matters. Our Supreme Court has so held in numerous cases. One of such cases is *McManus vs. Park*, 287 Mo. Rep. 109, where the Court on this principle, l.c. 119, said:

"* * * remedial statutes; where such statutes are ambiguous, or of doubtful application, * * * are liberally construed in order to effect the purpose of their enactment. * * * ."

The rule to which our attention is directed providing for an answer to be filed, and prescribing the period in which it shall be filed, and further providing that unless so filed the statements in the claim shall be taken as admitted, takes nothing away from the employer. The right granted him to file

answer is one not provided him by statute. But it is not a vested right. If he neglects or fails to take advantage of the privilege, he himself creates the limitation upon the introduction of evidence which might have been offered if his defense had been stated in an answer. In such case he should not be heard to complain. The cases hereinabove cited and quoted on the point preclude him from so complaining.

One of the questions you submit in your letter in paragraph (3) is, that if questions 1 and 2 are answered in the affirmative, may a referee or the Commission, enter a "default judgment" and make an award of compensation on the basis of the matters alleged in the claim alone, or must such witnesses as are available be heard. We believe the statements heretofore made in this opinion, with respect to questions 1 and 2 are sufficient answer to this question. If the employer or the insurer has a defense to the claim, under your rules he must controvert the same and make the matter issuable by answer, and if an answer is not filed within the time prescribed by the rule, the Commission, or a referee, would be justified in excluding evidence on such issue. If, on the other hand, there should be witnesses at hand who could give evidence on some matter not made issuable by an answer, but which would reveal all the facts in the development of the case, we believe the Commission, or referee, should hear such evidence.

The question submitted under paragraph 4 of your letter is, whether an allegation in the original claim that the employer and the employee are under the Compensation Act is sufficient without evidence to prove the same, and upon which to base an award, in the event there is no answer denying such allegation, on the ground that "statements in the claim for compensation shall be taken as admitted." This, too, we think, has been covered in the discussion in this opinion of Rules 1 and 2. In such case, we believe, the claim should necessarily, as a jurisdictional matter, state that both the employer and employee are under the Act. If this be stated in the claim and be not denied, it would be an admission by the employer that both are under the Act. It would be almost incredible to believe that an employer, who could in good faith make such a defense, would fail to interpose the same by the denial thereof in an answer.

However, the record upon a hearing of any claim should recite all jurisdictional facts. We believe that even though no answer should be filed denying a statement in a claim that

the employee and employer are both under the Act, a referee, or the Commission should hear evidence in support of all jurisdictional matters, including the fact that both the employer and employee are under the Act. The Commission, under the Act, has limited or special jurisdiction in the hearing of claims. There are no presumptions to be indulged in favor of the Commission's jurisdiction. Like records of Courts of inferior, limited or special jurisdiction, the records of the Commission must affirmatively show that there was jurisdiction of both the employer and employee under the Act. 15 C.J. 832, 833 and 834, states the rule as to inferior courts on this principle, as follows:

"The mere exercise of jurisdiction by courts of inferior, limited, or special jurisdiction does not raise a presumption of the existence of the requisite jurisdictional facts, for nothing is presumed to be within the jurisdiction of such courts; but one who relies upon a decision or order of such a court, or who claims any right or benefit under its proceedings, must affirmatively show its jurisdiction in the premises by alleging and proving the same. * * *."

If this be true as to inferior courts it would likewise be an appropriate rule to follow respecting the jurisdiction and authority of the Compensation Commission. It would, therefore, be necessary, we think, for the Commission or referee to take proof showing jurisdiction on this question and the record should recite the same.

CONCLUSION.

It is, therefore, the opinion of this Department:

1) That under Section 3727, R.S. Mo. 1939, rules adopted by the Division of Workmen's Compensation and the Industrial Commission of Missouri for the administration of the Workmen's Compensation Act are broad enough and necessary in the enforcement of the Act "to establish the requirement for 'Answer to Claim for Compensation.'."

2) That the Commission has the power to make and enforce a rule that the answer must be filed within a definite period.

Honorable Spencer H. Givens -12-

3) That the Commission has the power under said Section 3727, in the promulgation of its rules to refuse the offer of evidence on any matter not made an issue by an answer, except facts touching the jurisdiction of the Commission.

4) That regardless of whether it is denied in an answer that the employer and the employee are both under the Act, evidence should be heard under the claim that both are subject to the Act, in support of jurisdiction, and the record should so state.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

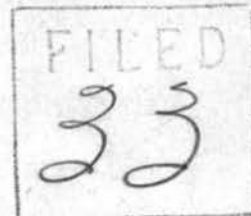
APPROVED:

J. E. TAYLOR
Attorney General
JTB

GWC:ir

SHERIFFS: Sheriff transporting veteran to veterans' hospital pursuant to order of probate court and paid 5¢ per mile by Veterans' Administration is not entitled to additional 5¢ per mile from county.

November 30, 1948



12-9
Honorable Charles E. Ginn
Prosecuting Attorney
Lawrence County
Mt. Vernon, Missouri

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Under the above act, our Probate Court recently committed a veteran to a veterans' hospital at Little Rock, Arkansas, delivered copy of the commitment to our sheriff, and ordered him to transfer the veteran to such hospital which the sheriff did. The Veterans' Administration, or other like agency, allowed the sheriff the sum of five cents per mile for this trip. He billed the court for an additional five cents per mile as he is entitled to receive ten cents per mile in civil cases. So far the county court has withheld payment of the additional five cents per mile on the theory that the sheriff had been fully paid by the administration. We would like an opinion from your department as to whether or not the sheriff is entitled to the five cents per mile, so that if he is so entitled, the court may pay him for such mileage."

Section 17, Laws of Missouri, 1947, Vol. I, page 4, provides that in proceedings under the laws of Missouri for the commitment of a person alleged to be of unsound mind or otherwise in need of confinement in a hospital or other institution for proper care when such person is eligible for care or treatment by the Veterans' Administration or other agency of the United States government, the court may commit such person to the Veterans' Administration or other agency.

Section 9355, R. S. Mo. 1939, provides the mileage and fees to be paid the sheriff for taking a patient to a state hospital or removing one therefrom. It is to be noted that Section 9355 applies only when the patient is taken to or from a state hospital. The general rule, with regard to payment of

compensation to a public officer, is found in Nodaway County vs. Kidder, 129 S.W. (2d) 857, where our Supreme Court said, l.c. 860:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S.W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 7, 72 S.W. 655; Williams v. Chariton County, 85 Mo. 645."

Since there is no provision for the payment of mileage by the county to a sheriff for transporting a person to a veterans' hospital, it is our opinion that the sheriff, who has been paid 5¢ per mile by the Veterans' Administration, is not entitled to any additional payment by the county.

CONCLUSION

It is the opinion of this department that a sheriff who transports a person to a veterans' hospital pursuant to commitment by probate court is not entitled to mileage to be paid by the county in addition to the mileage paid by the Veterans' Administration for transporting such person.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

CBB:VLM

DOGS AS DOMESTIC ANIMALS : Dogs are domestic animals. Sec-
WITHIN MEANING OF Sec. 4556,: tion 4556, R.S.Mo. 1939, is appli-
R. S. Mo. 1939. : cable to dogs as well as to the
animals specifically mentioned
therein.

December 16, 1948



Honorable James Glenn
Prosecuting Attorney
Macon, Missouri

Dear Sir:

This will acknowledge your letter in which you request an opinion of this department. Your letter is as follows:

"Your opinion is requested as to whether Section 4556, R. S. Mo. 1939, refers to dogs as well as the specific animals named therein."

The section referred to is as follows:

"Every person who shall willfully administer any poison to any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or to any domestic fowl, or shall maliciously expose any poisonous substance, with intent that the same shall be taken or swallowed by any cattle, hog, sheep, goat, horse, mule, ass or other domestic animal or domestic fowl shall, upon conviction, be punished by imprisonment in the penitentiary not exceeding three years or in the county jail not less than six months, or by fine not less than two hundred and fifty dollars or by both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months."

In considering this question, we believe that it is necessary to determine first whether a dog is a domestic animal in contemplation of Missouri law, and, second, whether the specific mention of the animals named by the statute renders the phrase "or other domestic animal" inoperative in accordance with the rule of statutory construction expressed by the maxim: "expressio unius est exclusio alterius"; and in considering this question we shall also

Honorable James Glenn

bear in mind the fact that this is a penal statute, and as such must be strictly construed. (State v. Bartley, 304 Mo. 58; State ex rel. Luther Spriggs v. E. F. Robinson et al. 253 Mo. 271, l.c. 284, 285.)

We shall first discuss the question as to whether or not a dog is a domestic animal. The following is a quotation from Corpus Juris Secundum, Vol. 3, p. 1084-85:

"Domestic animals include those which are tame by nature, or from time immemorial have been accustomed to the association of man or by his industry have been subject to his will, and have no disposition to escape his dominion."

We are of the opinion that a dog comes within the meaning of the above definition. Courts in some jurisdictions however have held that dogs are not domestic animals, but that on the contrary they are animals ferae naturae.

In the case of State of Maine v. Harriman, 75 Mo. 562, it was held that dogs are not domestic animals and the court refused to uphold a conviction for the killing of a dog as a violation of a statute making it a crime to kill or wound a domestic animal. One judge, however, vigorously dissented from this opinion and held that a dog is a domestic animal, and contended that the conviction should stand.

We have been unable to find an opinion by the Supreme Court of Missouri on the question as to whether a dog is a domestic animal, but we are of the opinion that the question is settled by the case of Merritt v. Matchett, 135 Mo. App. 176, in which the Kansas City Court of Appeals not only directly holds that dogs are not "ferae naturae" in the following language:

"Dogs are not classed as ferae naturae* * *."
(l.c. 183),

but in referring to the dog there involved, used the following language:

"Not only was he prone to attack dogs and other domestic animals* * *.";

thus holding by such use of the phrase "other domestic animals" that a dog is a domestic animal. We are, therefore, of the opinion that a dog is a domestic animal under the Missouri law, in view of the opinion last above quoted.

Honorable James Glenn

Since we hold that a dog is a domestic animal, we shall now discuss the question as to whether the specific mention of certain animals in the statute above referred to renders the general phrase "or other domestic animals" inoperative. While the maxim "expressio unius est exclusio alterius" is frequently applicable in statutory construction, it is modified by the doctrine of "ejusdem generis" and does not apply where the thing of which the general language is claimed to be descriptive is of the same class as the specific thing or things mentioned by the statute. The substance of the doctrine of "ejusdem generis" is stated in State ex rel. Robinson, 253 Mo. 271, 1.c. 287, as follows:

"There is a well recognized rule that where a law specifically designates several matters or things which shall be governed by its provisions, and then by general language undertakes to include other acts and things not specifically named, such law must be so construed as to apply only to things or acts of the same general nature as those definitely set out * * *. This is but the restatement of the rule of common sense and everyday experience of mankind. When a man is speaking only of bonds and promissory notes his mind is not supposed to be dwelling on wagons and threshing machines, and we do not apply his words uttered on that occasion to any such subjects. If a man speak of wild animals his mind is not likely at the selfsame time to dwell upon domestic animals, and it would be silly to give his words such a construction."

Pursuing the same thought, we suggest that where as in the statute under consideration the Legislature specifically mentioned cattle, horses, hogs, mules and asses, all of which are domestic animals, and then used the words "or other domestic animal", it is entirely reasonable to deduce that it intended the general phrase "or other domestic animal" to apply to any animal falling within the class of domestic animals to which class the animals specifically mentioned belong, and since a dog is a domestic animal that it intended the phrase to apply thereto. In other words, we hold that the doctrine of "ejusdem generis" applies to the statute under construction, and since we hold that dogs are domestic animals, we are of the opinion that the above-quoted phrase "or other domestic animal" is sufficient to bring the poisoning of a dog within the scope of the above-quoted statute.

Honorable James Glenn

A similar statute of the State of Iowa was similarly construed in State v. Enslow, 10 Ia. 115. This statute provided as follows:

"If any person maliciously kill, maim or disfigure any horse, cattle, or other domestic beast of another; or maliciously administer poison to any such animal * *".

Enslow was indicted under this statute for killing a hog. The phrase "or any domestic beast of another" was held sufficient to bring the hog within the provisions of this statute.

Furthermore, there is a well known rule of statutory construction to the effect that if possible a statute should be so construed as to give effect to every part thereof, and while it is true that penal statutes are to be strictly construed, the rule means only that the application of the statute shall not be broadened beyond the literal meaning of the words used. In this connection we quote as follows from the opinion of the court in Moore v. Telegraph Company, 164 Mo. 165, 1.c. 171:

"* * But by the expression 'strict construction' is meant that the scope of the statute shall not be extended by implication beyond the literal meaning of the terms employed, and not that the language of the terms shall be unreasonably interpreted. Courts should neither enlarge nor narrow the true meaning of penal statutes by construction, but should give effect to the plain meaning of the words, and where they are doubtful, should adopt the sense in harmony with the context and the obvious policy and object of the enactment."

CONCLUSION

We are, therefore, of the opinion that Sec. 4556, R. S. Mo. 1939, applies to dogs as well as to the specific animals named therein.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Hammett

CRIMINAL LAW: When several defendants jointly charged with a felony and one defendant disqualifies the magistrate at a preliminary hearing, that magistrate shall continue to examine other defendants. If, on a trial before a magistrate for a misdemeanor; it appear from evidence defendant should be put on trial for a felony, it is the duty of magistrate to dismiss the misdemeanor charge and proceed to have defendant charged with a felony in conformity with the statutes.

March 12, 1948

Honorable Arthur U. Goodman, Jr.
Magistrate
Dunklin County
Kennett, Missouri

3-22



Dear Judge Goodman:

This will acknowledge receipt of your request for an opinion, which reads:

"Please let me have your official opinion on the following matters at your earliest convenience:

"(1) When two or more persons are charged with a felony in Magistrate Court and prior to commencement of the preliminary examination one defendant files his affidavit disqualifying the Magistrate, does this disqualify the Magistrate from proceeding with the preliminary as to all defendants, or is a severance in effect brought about by the disqualification, so that preliminary will be held by the new Magistrate as to one defendant and as to all others by the original Magistrate before whom complaint was filed?

"(2) When a defendant is being tried in Magistrate Court for misdemeanor and the evidence shows that he should be put on trial for a felony, cognizable in the Circuit Court, exactly what procedure is followed, and is a sworn complaint charging the felony required to be filed?"

Under Sections 3864a and 3864b, page 843, Laws of Missouri 1945, there can be no question but that any defendant may be entitled to disqualify a magistrate for any of the grounds set out for disqualification under said act. Sections 3864a and 3864b, supra, under certain conditions provide that a magistrate may be disqualified to conduct an examination of any person

accused of a felony, upon said defendant's filing an affidavit, and further, prescribe a procedure for calling in another magistrate, however, there is no specific direction as to which magistrate shall hear the other defendants who may be jointly charged with the defendant that disqualifies the magistrate. Sections 3864a and 3864b read as follows:

"Section 3864a. Disqualification of magistrate.
--A magistrate shall be disqualified to conduct an examination of any person accused of felony as provided in this article if an affidavit is filed in his office by the accused, the prosecuting attorney, or the complainant, before the commencement of such examination, stating that the magistrate is near of kin to the accused by blood or marriage; or that the offense charged is alleged to have been committed against the person or property of such magistrate; or against some person near of kin to him by blood or marriage; or that the magistrate is in anywise interested or prejudiced, or shall have been counsel in the matter, as the affiant verily believes.

"Section 3864b. Proceedings in case of disqualification.--If the magistrate is disqualified as provided in the next preceding section, he shall set the examination down for hearing on some date within ten days after the affidavit is filed, and shall notify and request some other magistrate in the county, if there be one, or if not, some magistrate in an adjoining county, to conduct the examination at the office of the magistrate where the complaint is filed; and it shall be the duty of the magistrate so requested to appear at the time and place appointed for said examination, and he shall proceed with the same in like manner as if the complaint had originally been brought before him; provided however, that no judge of the circuit court nor any of the appellate courts of this state shall be requested to conduct such examination. When a magistrate appears and conducts an examination as herein provided, his actual traveling expenses at a rate not to exceed five cents per mile and his actual subsistence expense at a rate not to exceed five dollars per day shall be allowed him and shall

be taxed as costs in the case and shall be paid as other costs incurred on behalf of the state."

However, we can see no particular reason why the magistrate presiding at the hearing should not continue with the preliminary hearing and examine the other defendants who did not file affidavits to disqualify the magistrate. In the absence of any law disqualifying him, it is his legal duty to examine the defendants as required by law.

The following decision is somewhat analogous in *State v. Wetherford*, 25 Mo. 439, l.c. 442, in that the court held that where two are jointly indicted and only one applies for a change of venue, an order removing the cause will be effectual only as to the one applying for a change of venue. In so holding the court said:

"The venue in this case, so far as regards the defendant Clemsey Wetherford, was improperly changed from Morgan circuit court to the Benton county circuit court. Clemsey Wetherford did not petition for the change--took no steps to have it ordered, and the circuit court of Benton county had no jurisdiction over the case, so far as it relates to her."

Section 4036, R.S. Mo. 1939, provides that where there are several defendants in any indictment or criminal prosecution and cause for removal exists only as to part, the other defendant shall be tried in all proceedings had against them, in the county in which the case is pending, in all respects as if no order of removal had been made as to any defendant. In *ex parte Bedard*, 106 Mo. 616, l.c. 626, the court, after a lengthy discussion defining "criminal prosecutions," concluded that a preliminary examination is a criminal prosecution. In so holding, the court said:

"Having concluded that a preliminary examination is a 'criminal prosecution' within the meaning of section 4174, supra, and that said court is a criminal court within the meaning of the same section, it follows that

the judge of that court had no jurisdiction to hear and determine the issue raised, after the filing of the affidavits against him by the accused, and the subsequent trial and issuance of the writ of commitment were coram non judice and void. The affidavits rendered him incompetent to hear and try the cause. The only jurisdiction that remained in him after the filing of the affidavits was to make an order for the election of a special judge, or the calling in of another regular judge to dispose of the case. State v. Bulling, 105 Mo. 204, and cases cited."

While the foregoing provision may not be applicable to preliminary hearings before the magistrate, we think it advisable, under the circumstances and foregoing decision, in the absence of any law to the contrary, to follow the same procedure. Section 4050, R.S. Mo. 1939, further provides that when two or more defendants are jointly indicted for any felony, before announcing himself ready for any trial at any term of court, if he require it, he shall be tried separately, and in all other cases it shall be within the discretion of the court. The foregoing law refers solely to indictments, and, therefore, apparently is not applicable to preliminary hearings before a magistrate, since no preliminary examination is necessary when charged under an indictment returned by a grand jury.

Section 101, page 795, Laws of Missouri 1945, requires that the proceedings upon a trial of suits before magistrates with respect to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial, shall, where no other provision is made by law, be governed by the usage and practice in the circuit court, so far as the same may be applicable.

In view of the foregoing statutes dealing with preliminary hearings before magistrates when charged by information of a felony and as to the procedure applicable to defendants charged jointly of a felony after one defendant only has disqualified the circuit judge, we believe that, when several defendants are charged jointly with having committed a felony and one defendant disqualifies the magistrate at a preliminary hearing, that magistrate should continue to examine the other defendants just as if no affidavit had been filed by one defendant to disqualify him.

You next inquire as to what procedure should be followed when a defendant is being tried in a magistrate court for having committed an offense punishable as a misdemeanor and the evidence shows that he should have been charged with a felony. Section 28, page 757, Laws of Missouri 1945, provides that if, in the progress of any trial before a magistrate, under the provisions of this act, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a magistrate, the magistrate shall immediately stop all further proceedings before him, and proceed as in other cases exclusively cognizable before the circuit court, or other court in the county having jurisdiction thereof. The foregoing provision is ample authority for dismissing a misdemeanor and charging the defendant with a felony. Section 1206, Kelley's Criminal Law and Procedure, Fourth Edition, reads:

"If, in the progress of any trial before a justice of the peace for a misdemeanor, it shall appear that the accused ought to be put upon his trial for an offense not cognizable before a justice of the peace, the justice must immediately stop all further proceedings before him, and proceed as in other criminal cases exclusively cognizable before the circuit court, or other court in the county having jurisdiction thereof.

"The justice has no jurisdiction to punish a case of felony; therefore, if the evidence on the trial develops a felony, the justice must stop the trial and discharge the jury, if there be one, and let a new complaint be filed, charging the felony, and proceed with the preliminary examination, as in other cases of felony."

Section 3894, R.S. Mo. 1939, further prescribes the method of charging one with having committed a felony, and reads:

"Informations may be filed by the prosecuting attorney as informant during term time, or with the clerk in vacation, of the court having jurisdiction of the offense specified therein. All informations shall be signed by the prosecuting attorney and be verified by his oath or by the oath of some person competent to testify as a witness in the case, or be supported by the affidavit of such person, which shall be filed with the information;

the verification by the prosecuting attorney may be upon information and belief. The names of the witnesses for the prosecution must be indorsed on the information, in like manner and subject to the same restrictions as required in case of indictments."

Section 3895, R.S. Mo. 1939, further authorizes any person having knowledge of the commission of crime to make an affidavit and file it with the clerk of the court having jurisdiction, and reads:

"When any person has knowledge of the commission of a crime, he may make his affidavit before any person authorized to administer oaths, setting forth the offense and the person or persons charged therewith, and file the same with the clerk of the court having jurisdiction of the offense, for the use of the prosecuting attorney, or deposit it with the prosecuting attorney, furnishing also the names of the witnesses for the prosecution; and it shall be the duty of the prosecuting attorney to file an information, as soon as practicable, upon said affidavit, as directed in the next preceding section."

It is well established that one cannot be tried for a felony until he be charged by information of the prosecuting attorney or indictment returned by the grand jury. See Section 17, Article I, Constitution of Missouri 1945.

In view of the foregoing provision, when a magistrate is of the opinion from evidence adduced in a misdemeanor that the defendant should be charged with a felony, he should dismiss all proceedings and have the proper proceedings instituted to charge the defendant with a felony. This may be done by any person, having knowledge of the commission of the crime, making an affidavit, acknowledged by someone authorized to administer oaths, and filing same with the clerk of the magistrate court. The court will then proceed with the preliminary hearing.

CONCLUSION

Therefore, it is the opinion of this department:

(1) That when two or more persons are jointly charged in an information as having committed a felony, and one defendant

Hon. Arthur U. Goodman, Jr. -7-

files an affidavit in the magistrate court conducting the preliminary hearing to disqualify said magistrate from examining him, this does not prevent the magistrate from continuing the examination of all other defendants who did not file an affidavit to disqualify him, and it is his lawful duty to do so.

(2) When a defendant charged with a misdemeanor is being tried before a magistrate and the evidence adduced is of such a nature that the defendant could have been charged with having committed a felony, it is mandatory that the magistrate stop all proceedings and have proceedings instituted to charge said defendant with a felony. This may be done, in accordance with the statutes prescribing the procedure for charging one with a felony, by any person having knowledge of the commission of the crime making an affidavit, properly acknowledged by someone authorized to administer oaths, and filing same with the clerk of the magistrate court, whereupon, the magistrate will proceed with the preliminary hearing.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

ARH:LR

DUTIES OF
PROBATION OFFICER:

Mentally deficient child ordered committed to state hospital by Juvenile Court in St. Louis should be taken to the hospital by the Probation officer rather than by the sheriff.

January 28, 1948

FILED

35

Honorable James W. Griffin
Circuit Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri

2/3

Dear Sir:

This will acknowledge your recent letter in which you request an opinion of this department. Your letter is as follows:

"Today we received the enclosed letter from the Probation Officer of the Juvenile Court in this City. The contents requests for an opinion on the subject of whether it is the duty of an officer of the Juvenile Court, (a division of the Circuit Court of the City of St. Louis) to deliver a mentally deficient child to a State Hospital under a commitment from said court, or would this duty of delivery be performed by the Sheriff's Office?

"Please furnish this office an opinion on said subject."

An act approved on March 27, 1946, enacted by the 63rd General Assembly, Laws of Missouri 1945, page 632, repealed Section 9681, Article 9, Chapter 56, R.S. Mo. 1939, and enacted a new Section 9681 in lieu thereof, which said new section contains the following language:

"* * * Whenever there is to be a child brought before the juvenile court, it shall be the duty of the clerk of said court, if practicable, to notify the probation officer in advance of that fact. It shall be the duty of the probation officer to make such investigation of the child as may be required by the court, to be present in court in order to represent the

interests of the child when the case is heard, and to furnish to the court such information and assistance as the judge may require, and to take charge of any child before and after trial, as may be directed by the court. Probation officers are hereby vested with all the power and authority of sheriffs to make arrests and perform other duties incident to their office. The juvenile court shall have power to make rules specifying the duties of the probation officers in any and all cases.* * *

This section clearly imposes on the probation officer the duty to take charge of any child before and after trial as may be directed by the court. This being true, the question then occurs as to whether or not the duty thus imposed on said officer to take charge of any child " * * * after trial as may be directed by the court" extends to the taking of the child to the state hospital when the juvenile court has made an order directing that the child be placed in said institution; and, if so, whether or not he is the only officer upon which said duty devolves. In this connection, we suggest that the words of the statute imposing on the probation officer the duty "to take charge of the child * * * after trial, as may be directed by the court," being specific and containing no exception or qualification, must mean that it is the absolute duty of said officer under the statute to take charge of the child and do whatever the court directs shall be done, or, otherwise stated, whatever the court directs shall be done with the child shall be done by the probation officer and no one else.

Section 9348, R.S. Mo. 1939, provides for investigations into the present sanity of persons acquitted of criminal charges on the ground of insanity prevailing at the time of the commission of the offense charged. Section 9349, R.S. Mo. 1939, provides for the commitment of such persons found to be insane, if they be dangerous, to a state hospital, and provides further as follows:

" * * * an order shall be entered of record that he be sent to a state hospital, designating it, and further requiring the sheriff or other ministerial officer of the court, with such assistance as may be specified in the order, to convey such prisoner to the hospital, * * *" (Underscoring ours.)

This statute, in providing that the sheriff or other ministerial officer of the court shall convey the prisoner to the hospital, avoids conflict with the statute first above cited, which provides, as above set forth, that the probation officer shall take charge of any child before and after trial, as may be directed by the court, and confers on him the power and authority of sheriffs in the performance of duties incident to his office.

We assume that, in cases of commitment of a mentally deficient child to a state hospital, said commitment is made pursuant to the provisions of Sections 9348 and 9349, R.S. Mo. 1939, because we find no other statute under which such commitments are authorized. Construing together the provisions of Sections 9348 and 9349, R.S. Mo. 1939, on the one hand, and new Section 9681, Laws of Missouri 1945, page 632, on the other, we are of the opinion that, in case of such commitment by the juvenile court, the child should be conveyed to the state hospital by the probation officer.

CONCLUSION

Therefore, since Section 9349, R.S. Mo. 1939, does not limit the performance of the duty of conveying prisoners to the state hospital to sheriffs but specifically extends it to other ministerial officers of the court, and since new Section 9681, Laws of Missouri 1945, page 632, gives exclusive charge of any child before and after trial, as may be directed by the court, to the probation officer, we are of the opinion that, in case the juvenile court directs that a mentally deficient child be committed to a state hospital, it becomes the duty of the probation officer to convey said child to that institution.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:LR

MAGISTRATE COURTS:
FILING FEE:

Disposition of \$5.00 filing fee paid to the clerk of the magistrate court upon granting a change of venue.



March 5, 1948

9/10

Honorable W. L. Halbrook
Judge of Probate Court
Ex-Officio Judge of Magistrate Court
Dent County
Salem, Missouri

Dear Judge Halbrook:

This will acknowledge receipt of your request for an opinion, which reads:

"Would appreciate very much to have an opinion concerning the \$5.00 filing fee in Civil cases.

"Question: Where there is a change of venue granted does the \$5.00 filing fee follow the case to the circuit Court? Or is the clerk required to send the \$5.00 filing fee to the Department of Revenue the first of the following month?"

Section 23, page 776, Laws of Missouri 1945, requires anyone commencing any proceedings in a magistrate court to pay the clerk of the court a five dollar fee. Said section further provides that such fee shall be charged against the losing party, and if recovered from said party, shall be repaid to the party making the deposit, and further, makes it the mandatory duty of the clerk of the court to charge upon behalf of the state each fee accruing to his office, and at the end of each month to turn same over to the Director of Revenue of the State of Missouri. Said section reads as follows:

"Upon the commencement of any proceedings in the magistrate court the party commencing the same shall pay to the clerk of said court a magistrate fee of five dollars (\$5.00). The fees herein provided shall be charged against the losing party, and if

recovered from said party the same shall be repaid to the party making the deposit of such fee. Except as provided in Section 23a of this act, it shall be the duty of each clerk of the magistrate court, with the approval of the magistrate to charge upon behalf of the State every fee that accrues in his office and to receive the same, and at the end of each month, pay over to the director of revenue all monies (moneys) collected by him as fees, taking two receipts therefor, one of which he shall immediately file with the director of revenue, and shall at the end of each quarter make out an itemized and accurate list of all fees in his office, in which list shall be itemized all fees collected by him and also all fees due his office which have not been paid, giving the name of the person or persons paying or owing the same, and turn the same over to the director of revenue, stating that he has been unable, after the exercise of diligence, to collect the part unpaid, said report to be verified by affidavit, and it shall be the duty of the director of revenue to cause the fees unpaid within one year from the date accrued to be collected by law.

"All magistrate fees received by the director of revenue shall be deposited by him with the state treasurer in a special fund to be denominated 'magistrate fund', and all moneys in said fund shall be used exclusively for the payment of salaries of magistrates, their clerks, deputies and employees; provided, however, that such salaries may also be paid from the general revenue of the state whenever either the balance in the magistrate fund or the appropriation from such fund is insufficient to pay such salaries."

There seems to be no exception requiring the clerk to pay over the five dollar filing fee to the Director of Revenue at the end of each month except as provided in Section 23a of the

same act, which deals with magistrates that are selected to fill offices created by order of the circuit court, and in such cases, the fee is required to be paid over to the county treasurer at the end of each month instead of the Director of Revenue. We assume this is true for the reason that such magistrates are paid by the county instead of the state. In view of the foregoing statute, unless there can be found some statutory provision requiring said five dollar filing fee to be transferred to the clerk of the magistrate court, magistrate or circuit court, as the case may be, where the cause may be sent upon a change of venue, then we must conclude that said fee is not to be transferred to another court with the case.

Section 76, page 789, Laws of Missouri 1945, authorizes a change of venue in civil cases for certain specific causes, and reads as follows:

"Either party shall be entitled to change of venue in any civil cause pending before a magistrate, if he shall, before the jury is sworn or the trial is commenced before the magistrate, file an affidavit that the magistrate is a material witness for him, without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, or that he cannot have a fair and impartial trial before such magistrate on account of his bias or prejudice, or that he cannot have a fair trial in the county on account of bias and prejudice of the inhabitants of such county, which affidavit shall be made either by a party to a suit pending or by said party's agent or attorney."

Under Section 77, page 789, Laws of Missouri 1945, wherein an affidavit is filed requesting a change of venue, the magistrate must allow same, and it further directs said magistrate to immediately transmit all original papers and a transcript of his orders in the case to some competent magistrate, or, under certain circumstances, the cause shall be transferred to the circuit court. Said section reads:

"Upon the filing of the affidavit in due time, requesting change of venue, the magistrate must allow the change of venue

and enter an order accordingly, and immediately transmit all of the original papers and a transcript of all of his orders in the case to some competent magistrate in the county, if there be one, unless the party asking for a change of venue shall, in his affidavit, state that another magistrate in the county is a material witness for him without whose testimony he cannot safely proceed to trial, or that he is near of kin to either party, stating in what degree, in which case, or in the event there is no other magistrate in the county, the case shall be certified to the circuit court for trial as if originally filed in the circuit court, in which case the receiving court or magistrate shall be notified immediately by the magistrate granting the change of venue, by filing with the clerk of the circuit court or magistrate receiving the case on change of venue a certified copy of the order granting the change of venue, and upon receipt of such notice such magistrate or clerk of the circuit court to whom the change of venue is granted shall reset the case for trial on a day certain. If the change be allowed on account of bias or prejudice of the inhabitants of the county, all of the original papers and such transcript immediately shall be sent to a magistrate of some adjoining county for trial as herein above provided; provided, that when such affidavit for change of venue shall be filed, the magistrate shall have no further jurisdiction in the cause except to grant such change of venue."

Nowhere in either Section 76 or 77, supra, is the original filing fee of five dollars specifically required to be transmitted to the court receiving the cause upon a change of venue.

There is a well established maxim in law known as expressio unius est exclusio alterius, which means that where there is a statute prescribing that a thing shall be done in a particular manner it necessarily prohibits the doing of it in any other

manner. (See Lancaster v. Atchison County, 180 S.W. (2d) 706, 352 Mo. 1039. Also, Dietrich v. Jones, 53 S.W. (2d) 1059, 227 Mo. App. 365. The primary rule of statutory construction is to ascertain the lawmakers' intent from words used, if possible, and give it that effect. See Donnelly Garment Co. v. Keitel, 193 S.W. (2d) 577, 354 Mo. 1138. Also, State v. Ball, 171 S.W. (2d) 787.)

In the absence of any particular statute directing that the fee provided for in Section 23, supra, be transferred to the clerk of the magistrate court, magistrate or circuit court where the cause may be sent upon granting a change of venue, it certainly seems to have been the legislative intent that such fee should be delivered by the clerk to the Director of Revenue or the county treasurer, as the case may be, at the end of each month, and that said fee should not be transferred along with the case to the court receiving the cause upon change of venue.

CONCLUSION

Therefore, it is the opinion of this department that the five dollar filing fee required to be paid to the clerk of the magistrate court upon commencement of any proceedings shall be paid by said clerk to the Director of Revenue or the county treasurer, as the case may be, at the end of each month and shall not be transferred to the court receiving the cause by reason of a change of venue.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

ARH:LR

VITAL STATISTICS:
HOUSE BILL NO. 65:

Only information from records of clerks
and recorders may be required by State
Registrar.

September 23, 1948



Mr. Max E. Hall, President
Circuit Clerk's and Recorder's
Association of Missouri
Mt. Vernon, Missouri

Dear Mr. Hall:

This is in reply to your request for an opinion, which we
will restate for the purpose of brevity:

Must the circuit clerks and recorders furnish
all the information contained on the forms
provided by the State Registrar when comply-
ing with Sections 34-37 of House Bill No. 65
recently passed by the 64th General Assembly?

The real question involved in your request for an opinion is
whether or not the circuit clerks and recorders must obtain informa-
tion beyond that which is shown by their records.

Section 34 of House Bill No. 65 reads, in part, as follows:

" * * * Every officer who issues a marriage
license shall forward to the state registrar
on or before the 15th day of each calendar
month a list of the certificates of marriage
which were filed with him during the preced-
ing calendar month on forms to be furnished
by the state registrar."

The above section requires recorders to furnish the State
Registrar a list of the certificates of marriage which were filed
with him during the preceding month. The forms which have been
furnished by the State Registrar contain spaces for entries of
certain information which an applicant for a marriage license is
not required to give in order to obtain the license. We think
that, in order to obtain a proper interpretation of this new sec-
tion, recourse must be had to the language of the marriage stat-
utes. It is a settled rule for construction of statutes that all
acts in pari materia should be construed together.

Mr. Max E. Hall

Section 3365, R. S. Mo. 1939, provides, in part, as follows:

"The recorders of the several counties of this state, and the recorder of the city of St. Louis, shall, when applied to by any person legally entitled to a marriage license, issue the same, which may be in the following form: * * *"

(Thereafter follows a form of marriage license which may be issued by the recorder.)

It will be noted that the form furnished by the State Registrar asks for data which is not on the marriage license itself, such as color or race, date of birth, place of birth and previous marital status. Section 3365, supra, does not require that the exact age of the marriage parties be entered upon the license, but it is sufficient to merely state that the party is over the age, twenty-one if a male and eighteen if a female. If under this age, consent of the parent or guardian is made necessary by the terms of Section 3370, R.S.Mo. 1939.

Section 3361, R. S. Mo. 1939, prohibits certain marriages, and Section 3364, Mo. R.S.A., as amended, provides that certain health reports must be obtained before a marriage license may lawfully be issued.

If a male and female should apply to the recorder for a marriage license, and having shown that they meet the requirements so as to be legally entitled to the same, it becomes the recorder's duty to issue the license. His wilfull neglect or failure to issue the license would make him subject to prosecution for a misdemeanor under the provisions of Section 3367, R. S. Mo. 1939. We think that it would be no defense for a recorder to refuse to issue a license on the grounds that the persons applying refuse to give certain of the information contained in the State Registrar's form. In these premises, it is our opinion that the information to be furnished the State Registrar may be limited to that shown on the records of the recorder.

However, we also see no objection to the co-operation of the recorders with the State Registrar in making the information available, if it is possible to obtain it, at the time of the issuance of the license. One of the evident purposes of House Bill No. 65 is to provide a central agency to which persons seeking information concerning marriages and the like may apply and be directed to the county and official from whom they may obtain the desired information. The office of Vital Statistics is performing a great public service and should have the co-operation of public officials insofar as they are able.

Mr. Max E. Hall

We are also of the opinion that the information to be furnished the State Registrar concerning divorces and annulments of marriage may be obtained from the records, decrees and pleadings in the case, and that it is not necessary for the clerk to go to other sources for the information. The furnishing of certain information is not a requirement to be met before a decree of divorce may be obtained, and in some instances the clerk might not be able to obtain the information at all. Here again, it would depend to a large extent upon the co-operation of the parties to the divorce proceedings. We are reluctant at this time, in the very beginning of this vast undertaking of the collection of vital statistics, to say that the Legislature intended that the clerks and recorders should obtain information from sources outside their official records and transmit the same to the State Registrar.

Section 16 of House Bill No. 65 provides generally that the forms of certificates shall include as a minimum the items required by the respective standard certificates as recommended by the National Office of Vital Statistics. It is our view that the correct interpretation of this section is that it applies to such matters as births, deaths, stillbirths, etc., and was not intended to be read in connection with Sections 34-37.

We have been informed that the circuit clerks and recorders, almost without exception, are co-operating very well with the State Registrar in the matter of furnishing the information which the office seeks. As above stated, we see no reason why this co-operation may not be continued in the public interest where it is possible to do so.

CONCLUSION

Therefore, it is the opinion of this department that the only information which may be required by the State Registrar of Vital Statistics, by virtue of Sections 34 to 37 of House Bill No. 65, is that which may be obtained from the official records of the clerks and recorders.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS: Deputy sheriffs appointed by the sheriff in counties of third class under authority of Sec. 2, Laws of 1945, p. 1562, do not have a "term of office" and compensation of such deputies may be changed at any time by the circuit judge.

Filed: #37

January 14, 1948

Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri



Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"As you know, the deputy sheriffs at the present time are upon a salary basis, the salary being fixed by the Circuit Judge. This is in accordance with the laws enacted in 1945. We have, here in this county, a deputy sheriff who has been appointed for a term which expires January 1, 1949. He is desirous of an increase in his salary, to meet higher living costs.

"The question has arisen whether, under the present Constitution, he can legally receive an increase of salary during his present term. Article 7, Section 13, of the present Constitution, provides 'compensation that state, county, and municipal officers shall not be increased during the term of office'. The Supreme Court, as you know, in Case of State Ex Re vs. Bus, 135 Mo. 325, has held that the deputy sheriffs appointed by the sheriffs, with approval of the Court, under the Statutes, as they then stood, are public officers. Also, that they possess all the powers to perform any of the duties prescribed by law, to be performed by the sheriff, and his powers and duties are equal to those of the sheriff himself; that the deputy sheriff is a public officer, under the laws of this State, and his powers are equal with that of the sheriff.

"In view of the Constitutional provision, and the decision which is cited, ~~there~~ is a question in my mind whether or not this deputy sheriff can legally have his salary increased during the year 1948.

"I would very much appreciate an opinion from your department upon this question."

We presume that the deputy sheriff referred to in your letter is one appointed by virtue of Section 2, Laws of Missouri, 1945, page 1562, providing for the appointment of deputies by the sheriff of a third class county, providing that the judge of the circuit court shall determine the number and compensation of such deputies and that the judge shall annually, and oftener if necessary, review his order fixing the number and compensation, and that the sheriff may at any time discharge such deputies. It is our opinion that the provision in such section that the sheriff may at any time discharge any deputy is equivalent to stating that the deputy serves at the pleasure of the appointing power.

We are enclosing a copy of an official opinion of this department rendered to B. H. Howard under date of August 16, 1947, in which this department held that an officer who serves at the pleasure of the appointing power does not have a "term of office," and that the constitutional prohibition against increasing an officer's salary during his term of office does not apply to such an officer.

We are further persuaded to the view that such deputy sheriff does not have a "term of office" and that the constitutional prohibition against increasing an officer's salary during his term of office does not apply to a deputy sheriff in a county of the third class, since Section 2, laws of Missouri, 1945, page 1562, provides that the circuit judge shall annually, and oftener if necessary, review his order fixing the number and compensation of the deputies. Since the circuit judge may review his order both as to the number and compensation as often as necessary, it is obvious that he may change either the number or the compensation of such deputies when he sees fit.

You state that the deputy has been appointed for the term which expires January 1, 1949, but, in view of the foregoing, it is our opinion that he could not have been appointed for such a term and that the constitutional prohibition against increases in salary does not apply to such an officer.

Honorable Leo J. Harned

-3-

CONCLUSION

It is the opinion of this department that a deputy sheriff appointed by a sheriff of a third class county under the provisions of Section 2, Laws of Missouri, 1945, page 1562, does not have a "term of office," and that the compensation of such deputy may be changed at any time by the circuit judge.

Respectfully submitted,

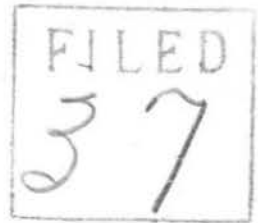
C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CITIES OF THIRD CLASS: City of third class has power to arrest, try
ORDINANCES: and fine a person driving a motor vehicle
DRUNKEN DRIVING: while intoxicated within the limits of such
city when an ordinance on such subject has
been passed.

January 21, 1948



Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting
an official opinion of this department and reading as follows:

"I would like to know whether or not a city
of the third class has the power and author-
ity under city ordinance to arrest, try, and
fine a person charged with driving a motor
vehicle while intoxicated."

Section 6949, R. S. Mo. 1939, provides as follows:

"The mayor and council of each city governed
by this article shall have the care, manage-
ment and control of the city and its finances,
and shall have power to enact and ordain any
and all ordinances not repugnant to the Con-
stitution and laws of this state, and such
as they shall deem expedient for the good gov-
ernment of the city, the preservation of peace
and good order, the benefit of trade and com-
merce, and the health of the inhabitants there-
of, and such other ordinances, rules and regu-
lations as may be deemed necessary to carry
such powers into effect, and to alter, modify
or repeal the same."

In construing the above-quoted section, the Springfield
Court of Appeals held in the case of Carthage v. Block, 139 Mo.
App. 386, that such section authorized the passage of an ordi-
nance prohibiting the drinking of intoxicating liquors on the
streets, etc., of Carthage. Even though the ordinance in that
case was held unreasonable, the court recognized the right of

the city to enact a reasonable ordinance under authority of Section 6949. The court said, l. c. 389:

"Among the powers granted by the State to cities of the third class--of which the city of Carthage is one--is the power 'to enact ordinances to prohibit and suppress houses of prostitution and other disorderly houses and practices and gambling houses and all kinds of public indecencies.' (R. S. 1899, section 5835.) And, in what is called the general welfare clause, section 5834, R. S. 1899, it is provided: 'The mayor and council of each city governed by this article shall have the care, management and control of the city and its finances, and shall have power to enact and ordain any and all ordinances not repugnant to the constitution and laws of this State, and such as they shall deem expedient for the good government of the city, the preservation of peace and good order, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be deemed necessary to carry such powers into effect, and to alter, modify or repeal the same.'

"Is the ordinance in question a necessary or proper police regulation? Is it to be deemed by the courts as 'expedient for the good government of the city, the preservation of peace and good order,' or should it be denounced as an unwarrantable invasion of the 'personal liberty' of the citizen?

"Should we find that the conduct interdicted was a proper subject for police regulation, we think there can be no reasonable question of the power of the city to enact the ordinance under the grant embodied in the provisions of the general welfare clause, though the subject of this precise regulation is not specifically mentioned in the statute. In the case of *City v. Schoenbusch*, 95 Mo. 618, the Supreme Court said: 'General welfare clauses are not useless appendages to the charter powers of municipal corporations. They are designed to confer other powers than those spe-

cifically named. The difficulty in making specific enumeration of all such powers as may be properly delegated to municipal corporations renders it necessary to confer such powers in general terms. Ordinances relating to the comfort, health, good order, convenience and general welfare of the inhabitants are regarded as the exercise of police regulations.'

The court further said, l. c. 391:

"The doctrine of these cases was applied by the St. Louis Court of Appeals in the case of the city of Lebanon v. Gordon, 99 Mo. App. 277. 'There can be no doubt of the authority of the mayor and board of aldermen of a city of the fourth class to pass an ordinance to punish the offense under the general power to pass such ordinances as "shall be deemed expedient for the good government of the city, the preservation of peace and good order."'"

The enactment of an ordinance by a city of the third class regarding the driving of a motor vehicle while intoxicated is, therefore, a proper police regulation under authority of Section 6949. The fact that there is a state law which makes driving while intoxicated a graded felony does not preclude the right of a city of the third class to enact, and enforce by fine, an ordinance regarding driving while intoxicated within the city limits.

In the case of City of St. Louis v. Vert, 84 Mo. 204, the Supreme Court upheld a conviction for violation of a city ordinance of St. Louis regarding the carrying of concealed weapons, even though there was a state law on the same subject, and held that a prosecution for a violation of a city ordinance was a civil proceeding. The court said, l. c. 209:

"The action is a civil, rather than a criminal one, for breach of a city, not a state law, and does not affect, and is not affected by, the state law against the carrying of concealed weapons. Hollwedell case, supra.

"Under its general grant of powers, the city might well adopt and enforce, in manner as provided, such an ordinance as appellant is

found to have violated. It is a wholesome provision for the preservation of peace and order in the city.

* * * * *

"The constitution is not violated in the making or enforcing of the ordinance. In the constitution the citizen has many priceless rights guaranteed to him; but unluckily for appellant, the 'right' to carry concealed in his hip pocket knuckles of brass, a weapon of dangerous and deadly character, is not a 'right' protected by any constitutional guaranty."

The Supreme Court held in the case of State v. Muir, 164 Mo. 610, that since a prosecution for violation of a city ordinance of Mexico was a civil action, that after a conviction of violating the ordinance, a prosecution for the same act in the circuit court for violating the state law was not unconstitutional as violating the constitutional prohibition against double jeopardy. The court said, l. c. 615:

"These deliverances of this court thus establishing that a prosecution under a city ordinance was but a civil action, necessarily precluded the idea of a conviction of violating such ordinance from being pleaded in bar of a prosecution by the State of a crime based on a violation of a State statute, which prosecution rests on the same foundation of fact as did the act for doing which the city first moved against the defendant. In a plea in bar to the prosecution of the State, the defendant must allege and prove that he is prosecuted for the same crime of which he had been autre fois convict, or autre fois acquit, in a prior prosecution by the city. But this he can not prove, if the proceeding instituted by the city was but a civil action."

The Supreme Court in the case of Canton v. McDaniel, 188 Mo. 207, on the authority of the Muir case, supra, held that an acquittal in a prosecution by the State was no bar to a civil action under an ordinance of a city. The court said, l. c. 228:

"The civil action by the town for violating its ordinance was not affected by the criminal prosecution by the State. The acquittal of the latter was no bar to the civil action. * * *"

The Kansas City Court of Appeals in the case of *City of Linneus v. Dusky*, 19 Mo. App. 20, held that an ordinance of the City of Linneus with regard to the carrying of concealed weapons did not conflict with the State law on the same subject, and said, l. c. 23:

"Certainly there is, in contemplation of well settled rules of law, no conflict between these laws. Both the state and the city may punish for the same offence. State v. Bentz, 11 Mo. 61; City of St. Louis v. Cafferata, 24 Mo. 96-97."

Section 6913, R. S. Mo. 1939, which provides, in part, as follows:

"If, in the progress of any trial before the police judge, it shall appear that the accused ought to be put upon his trial for an offense against the criminal laws of the state and not cognizable before him as police judge, he shall immediately stop all further proceedings before him as police judge, and shall cause the complaint to be made before himself as a justice of the peace, or before some other justice of the peace, and the accused shall thereupon be proceeded against in the manner provided by general law. * * *"

would not prohibit a city of the third class from proceeding under an ordinance with regard to driving while intoxicated, since such section has been held to be directory only, and since a prosecution for violation of an ordinance is a civil action only and is cognizable before the police judge.

In the case of *Poplar Bluff v. Meadows*, 187 Mo. App. 450, the Springfield Court of Appeals said, l. c. 456:

"Defendant contends that the evidence adduced shows that he was guilty of a felony for displaying the sign of an honest occupation when in fact he was conducting a bawdyhouse and that the city thereupon lost its right to prosecute

under its ordinances, citing section 4758 and section 9191, Revised Statutes 1909. The defendant is not charged with or convicted of a felony; nor will this judgment bar a prosecution by the State under section 4758. Section 9191 is merely a directory statute and not one that can avail the defendant in this connection."

The ordinance of a third class city with regard to driving while intoxicated need only be such an ordinance as will conform with the state law on the same subject as the ordinance, under the requirements of Section 7442, R. S. Mo. 1939.

Since in the statement of facts in your request for an opinion you have stated that the violation of the ordinance would result in a fine, it is obvious that the city ordinance in such case would conform with the state law on the same subject.

CONCLUSION

It is the opinion of this department that a city of the third class has the power and authority, under an ordinance of such city with regard to driving a motor vehicle while intoxicated within the city limits, to arrest, try and fine a person charged with the violation of such ordinance.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

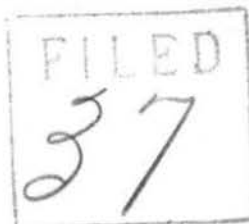
APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

CHIROPODY: Person advertising as "orthopedic shoemaker" and "foot appliance specialist" is engaged in practice of chiropody.

February 20, 1948



L. A. Hansen, D.S.C.
Secretary
Missouri State Board of Chiropody
702 Shukert Building
Kansas City, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"As Secretary of the Missouri State Board of Chiropody, I am confronted with a situation which I shall appreciate your opinion, whether or not it is a violation of the Chiropody Act.

"Enclosed you will find an advertisement in the 'Kansas City Star' on November 30, 1947, of James Ventola, 3319 Troost, Kansas City, Missouri. You will notice in this advertisement that part of it reads, Quote, 'We will stop the settling and comfort your feet with our leather and felt arch supports made to your individual foot measurement.

"We gradually build your arch supports up to normal over a period of 90 days, plus our comfortable, free service.' Unquote.

"In my opinion, the above statement would make the people believe that he is making a support for the individual and then making individual adjustments for health purposes, rather than selling a stock support, according to sizes made and sold as a piece of merchandise.

"You will notice in this advertisement that he is holding himself out as a foot appliance specialist, one who knows how a shoe with an arch support should be fit to be comfortable. It is my opinion that he is trying to make the people believe that he has a special knowledge regarding the foot."

On November 3, 1947, this department issued to your Board an opinion, copy of which is enclosed herewith, to the effect that one who is not licensed to practice chiropody, and who advertises and holds himself out as a "Cuneiform Specialist" violates the provisions of Section 9800, R.S. Mo. 1939, which prohibits the practice of chiropody without a license. The principles which were applied in that opinion are, we believe, applicable to the present situation. In this case, the person advertises himself as a "foot appliance specialist." By doing so, he purports to treat the foot by "mechanical means," which is, under Section 9801, R.S. Mo. 1939, prima facie evidence of the practice of chiropody. By so advertising, he also places himself beyond the exemption provided by Section 9809, R.S. Mo. 1939, which extends to manufacturers and dealers in shoes or corrective appliances for deformed feet, that section expressly providing that such manufacturers and dealers shall not be entitled to practice chiropody unless licensed to do so.

CONCLUSION

One who advertises as an "orthopedic shoemaker" and "foot appliance specialist" is engaged in the practice of chiropody under Section 9801, R.S. Mo. 1939; and, if he does so without a license to practice chiropody, violates Section 9800, R.S. Mo. 1939.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

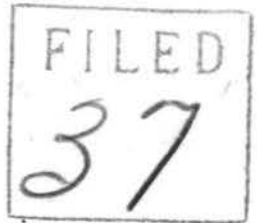
APPROVED:

J. E. TAYLOR
Attorney General *JET*

RRW:LR

Copy to E. B. Harned
LIQUOR LAWS: Sec. 4992, R.S. Mo. 1939, applies to the provisions of Art. 2, Chap. 32 in existence at the time said Sec. was enacted, and also applies to any provision of Art. 2, Chapter 32, enacted by the Legislature since the time of its enactment.

April 28, 1948



5-7

Honorable Leo J. Harned
Prosecuting Attorney
Pettis County
Sedalia, Missouri

Dear Mr. Harned:

Your opinion request of recent date reads as follows:

"Will you please inform me whether or not Section 4992, R.S. Missouri, 1939, of the Liquor Laws of Missouri, applies to liquor laws passed by the Legislature after this act was passed, or does the ordinary misdemeanor penalty apply.

"I would appreciate your opinion at your earliest convenience."

Section 4992, R.S. Mo. 1939, is contained in Article 2, Chapter 32, R.S. Mo. 1939, entitled "Non-intoxicating Beer Laws".

Section 4992, supra, was enacted, Laws of Missouri, 1935, page 395, as Section 13139z-20. Said Section is as follows:

"Any person violating any of the provisions of this article shall be deemed guilty of a misdemeanor, except where the punishment is specifically prescribed by this article, and shall be punished by imprisonment in the county jail for a term of not more than one year, or by a fine of not less than fifty dollars (\$50.00) nor more than one thousand dollars (\$1,000.00) or by both such fine and jail sentence."

This Section specifically provides that a violation of any of the provisions of Article 2, Chapter 32, where no specific penalty is imposed, shall be considered a misdemeanor and punished in the manner as provided therein. We deem it well to point out that in Laws of Missouri, 1933, there was enacted by the Legislature, page 264, Section 13139y, a provision providing that: "Any person convicted of the violation of any provision of this article, the violation of which is by this article defined as a misdemeanor, and for which no specific punishment is in this article provided, shall upon conviction thereof be punished as otherwise provided by law, * * *". This Section was repealed by the re-enacting Act of 1939, Laws of Missouri, 1939, page 824, Section 13139y, and is now shown in the Revised Statutes of Missouri, 1939, as Section 4974, and reads, in part, as follows:

"Any violation of any of the provisions of this article not otherwise defined, shall be a misdemeanor, and any person guilty of violating any of said provisions, and for which violation no other penalty is by this article imposed, shall, upon conviction thereof be adjudged guilty of a misdemeanor and punished by a fine of not less than Fifty (\$50.00) Dollars, nor more than One Thousand (\$1,000.00) Dollars, or by imprisonment in the county jail for a term not exceeding one year, or by both such fine and jail sentence. * * *".

It is obvious that the two sections of the Missouri Statutes, Section 4992, supra, and the above quoted part of Section 4974, are identical in purpose and content.

There are many provisions in Article 2, Chapter 32, R.S. Mo. 1939, which provide a specific penalty for a violation of said Section, such as: the penalty for evading the permit or inspection fee, Section 4971, R.S. Mo. 1939; the penalty for unlawful sale or use of stamps, Section 4969, R.S. Mo. 1939. Many provisions of Article 2, Chapter 32, R.S. Mo. 1939, do not provide a specific penalty: for example, Section 4963, R.S. Mo. 1939, provides how beer shall be sold but establishes no penalty for a violation of said Section; Section 4980, R.S. Mo. 1939, makes it unlawful to use materials other than those named in the Section in the manufacture of beer, but provides no specific penalty for the violation of said Section.

Support for the reasoning outlined above is found in the case of State vs. Cox, 234 Mo. 605. While it is true that this case is not concerned with the Liquor Control Act, it does denote what we believe to be the proper legal principle. In that case the defendant was found guilty of obstructing a police officer in the discharge of his official duty as prohibited by Section 4363, R.S. Mo. 1909. The defendant was convicted and appealed to the Supreme Court. One of the contentions raised by the defendant was that Section 4363, R.S. Mo. 1909, prohibiting the obstruction of officers in the discharge of their official duties could not apply to an officer seeking to enforce the primary election law because such primary law was enacted subsequent to said Section 4363. The Court, in answering this contention, made the following observation, l.c. 610:

"* * * The primary election law makes no special provisions for its enforcement, hence the courts will assume that the aforesaid section in regard to obstructing officers was meant to apply arrests for its violation. To rule otherwise would be equivalent to saying that every time a new criminal statute is enacted, before it could be enforced, the whole body of the criminal procedure must be amended or re-enacted; otherwise it would not apply to such new law. We are of opinion that in enacting section 4363, supra, it was intended by the General Assembly that it should apply to all future arrests and prosecutions, whether for violation of laws thereafter enacted or statutes then in existence. * * *".

CONCLUSION.

It is, therefore, the opinion of this Department that Section 4992, R.S. Mo. 1939, applies to the provisions of Article 2, Chapter 32, in existence at the time said Section was enacted, and also applies to any provision of Article 2, Chapter 32, enacted by the Legislature since the time of its enactment.

Respectfully submitted,

APPROVED:

WILLIAM C. BLAIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

WCB:ir *TJB*

OFFICERS: Offices of Judge of County Court and Member of the County Board of Education inconsistent.

July 1, 1948

FILED 37



Honorable Lane Harlan,
Prosecuting Attorney
Cooper County,
Boonville, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Judge William Gerhardt, a member of our County Court, is desirous of getting an interpretation of Senate Bill No. 307 of the Sixty-Fourth General Assembly. As a member of the County Court he desires to know whether or not he would be eligible to become a member of the County Board of Education. Judge Gerhardt is qualified to be a member under Section One of the act. His specific question is whether or not the office of County Judge would be incompatible with the office of a member of the County Board of Education?"

Senate Bill No. 307 of the 64th General Assembly provides for the creation of county boards of education within each county of the state. The board is to be composed of six members. Section One of the Act provides for their selection by members of the boards of education and boards of directors of the various school districts of each county. The persons so selected are required to be citizens of the United States and of the State of Missouri, a resident householder of the county and not less than twenty-four years of Age.

Section 6 of Act provides as follows:

"Section 6. The county board of education, as provided for in the preceding sections, shall

"(1) Within six months after its organization, make or cause to be made and completed a comprehensive study of each school district of the county and prepare a plan of reorganization. Such study shall include:

"(a) The assessed tax valuation of each existing district and the differences in

such valuation under the proposed reorganization plan;

"(b) The size, geographical features and the boundaries of the proposed enlarged districts;

"(c) The number of pupils attending school, average daily attendance, and the population of the proposed enlarged districts;

"(d) The location and conditions of school buildings and their accessibility to the pupils;

"(e) The location and condition of roads, highways and natural barriers within the county;

"(f) The high school facilities of the county and recommendations for improvement of same;

"(g) The conditions affecting the welfare of the teachers and pupils;

"(h) Any other factors concerning adequate facilities for the pupils.

"(2). Upon completion of the comprehensive study, but not later than May 1, 1949, submit to the State Board of Education, a specific plan for the reorganization of the school districts of the county. Such plan shall be in writing and shall include such charts, maps and statistical information as are necessary to properly document the plan for the proposed reorganized districts.

"(3). Continue to study the school system of the county and propose subsequent reorganization plans as conditions warrant.

"(4). Cooperate with boards of adjoining counties in the solution of common organization problems, and submit to the State Board of Education for final decision any and all organization questions on which the cooperating boards fail to agree.

"(5). Approve the budget prepared by the county superintendent of schools in cooperation with the clerks of the boards of the several districts and approve the audit, made by the county superintendent,

of the expenditures report prepared by the district clerk and submitted for the approval of the State Board of Education.

"(6). Continue to advise with the county superintendent of schools, school patrons, and school officials on all matters pertaining to the improvement of the schools in the county."

Section 4 contains the following provision:

"* * * If one or two vacancies occur in the membership of the county board of education the remaining members shall, before transacting any official business, appoint one or two qualified persons to fill such vacancies until the next annual meeting for the election of the members of the county board of education. In the event the board should be unable to agree in filling a vacancy or there should be more than two vacancies at any one time, the county court, upon notice from the secretary of the board of such vacancy or vacancies, shall immediately fill the same by appointment and shall notify said person or persons in writing of such appointment and the person or persons so appointed shall serve until the second Tuesday in April of the following year, when their successors shall be elected for the unexpired term." (Emphasis ours.)

There is no constitutional or statutory prohibition against the same persons holding the office of judge of the county court and member of the state board of education. Any objection must be based upon the common-law doctrine, which prohibits one person from holding two or more incompatible offices. The rule as stated in *State ex rel. Walker v. Bus*, 135 Mo. 325, 1.c. 338, 36 S.W. 636, is as follows:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the offices, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N.Y. loc. cit. 304: 'Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se, have the right to interfere, one with the other, before they are incompatible at common law.'"

In the present case there would appear to be no essential conflict between the duties of a judge of the county court and those of a member of the county board of education, as hereinabove set out. However, the provision for the filling of vacancies in the county board of education by the county court under certain circumstances does present some difficulty. If one member of the county court is eligible to serve on the county board of education, two or three members of the county court might likewise do so. Should there be two members of the county court serving on the county board of education and more than two vacancies occur in the board of education, the filling of vacancies would devolve upon the county court, and the two members of the county court who were members of the board of education, would be in a position to fill the vacancies and thereby obtain control of the county board of education.

The Legislature has seen fit, where more than two vacancies occur, to take the power of filling the vacancies out of the hands of the county board of education. However, in the situation mentioned above, two members of the county court would be in a position to fill the vacancies in such capacity, whereas they would not be able to do so as members of the county board of education. This situation is believed to involve the possibility of antagonism which the common law rule is intended to avoid. The fact that the possibility might be remote does not alter the application of the rule. (*Knuckles v. Board of Education of Bell County*, 272 Ky. 431, 114 S.W. (2d) 511).

The courts of this state have never considered the question of whether or not the right of appointment might result in incompatibility, but the Supreme Court of New Jersey did so hold in the case of Westcott v. Scull, 87 N.J.L. 410, 98 Atlantic, 407.

CONCLUSION.

Therefore, this department is of the opinion that the offices of judge of the county court and member of the county board of education are inconsistent and cannot be held by the same person.

Respectfully submitted,

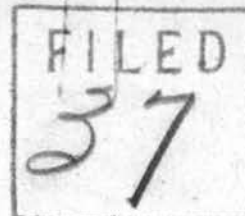
ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

RRW/LD

STATE COLLEGES: Vice President of Board of Regents should
serve remainder of biennium upon death of
BOARD OF REGENTS: President.



August 6, 1948

8-9

Board of Regents
Southeast Missouri State College
Cape Girardeau, Missouri

Attention: Miss Margaret Harger,
Secretary

Gentlemen:

This is in reply to your letter of recent date requesting
the opinion of this department, and reading, in part, as follows:

"At a meeting of the Board of Regents of
the Southeast Missouri State College held
on Wednesday, June 16, 1948, upon motion
of Judge I. R. Kelso, seconded by Mr.
Russell L. Dearmont, the following motion
was adopted:

"That the Secretary of the Board be and
she is hereby directed to communicate
with the Attorney-General of the State
of Missouri outlining the facts relative
to the death of members of the Board and
the appointment of their successors and
ask the question as to whether under the
State the Board should elect a president
and other officers at this time under the
above fact or whether the vice president
and other officers of the organization shall
continue to the end of the terms for which
the new members were appointed."

"The essential facts are as follows: On
April 7, 1948 Congressman Orville Zimmerman,
of Kennett, Missouri, a member of the Board
of Regents, term to expire January 1, 1949,
died; and on April 8, 1948 Honorable Ralph E.
Bailey, of Sikeston, Missouri, a member of
the Board of Regents, term to expire January 1,

1953, also died. At the meeting of the Board of Regents of the Southeast Missouri State College held June 16, 1948, Honorable Russell L. Dearmont, of St. Louis, Missouri, presented his commission from Governor Phil M. Donnelly as successor to Congressman Orville Zimmerman and Honorable C. D. Matthews, 3rd, of Sikeston, Missouri, presented his commission from Governor Phil M. Donnelly as successor to the Honorable Ralph E. Bailey. The Honorable Ralph E. Bailey was President of the Board of Regents. The Honorable Fred A. Groves, of Cape Girardeau, Missouri, is Vice President of the Board. The biennial organization of the Board was effected at its spring meeting in 1947. The normal time for the election of officers would be the spring of 1949."

Members of the Board of Regents of the Southeast Missouri State College at Cape Girardeau, Missouri, are appointed in the following manner, as provided by Section 10755, Laws of Missouri, 1945, page 1684:

"Every two years during a regular session of the general assembly, the governor shall, by and with the advice and consent of the senate, appoint two regents for each college, and whenever a vacancy occurs in either of said boards by death, resignation, removal from the district or by operation of law or otherwise, the governor shall, in a like manner immediately appoint some competent person to fill such vacancy, and communicate his action thereon to the senate at the next session of the general assembly thereafter. The person so appointed shall hold his office subject to the confirmation of the senate, for the unexpired term; Provided, that not more than three of said board, excluding the state commissioner of education shall belong to the same political party."

Said board is composed of seven members (Section 10754, Laws of Missouri, 1945, page 1684) who hold office for terms

of six years (Section 10756, R. S. Mo. 1939), and is organized by the selection of certain officers, among which are President and Vice President (Section 10757, R. S. Mo. 1939). Provision for the time and manner of selecting officers of the board is made in Section 10759, R. S. Mo. 1939, which is as follows:

"A meeting of each board of regents shall be called by the president thereof at the earliest convenient time and place following the appointment of new members in any biennial period for the purpose of selecting officers for the ensuing biennial period and the transaction of such business as may be regularly presented and as the board may direct. The board at its first meeting shall fix the date of the next annual meeting; adjourned meetings may be held at such times and places as may be determined at any previous meeting. Upon the written request of any two members of the board, or at the request of the faculty, signed by the president or vice-president and certified by the secretary thereof, the president of the board shall call a meeting, and the secretary shall notify each member of the board of such called meeting, and the object or objects thereof, and no other business shall be transacted at such meeting unless all members of the board are present and consent thereto. Each member of the board shall receive as full compensation for his services six cents per mile for each mile necessarily traveled in going to and from each meeting of the board and the actual expenses incurred during his attendance at the same, to be paid out of the contingent fund of the college."

Your attention is directed to the first part of Section 10759, supra, which provides that a meeting of each board of regents shall be called by the president thereof at the earliest convenient time and place following the appointment of new members in any biennial period for the purpose of selecting officers for the ensuing biennial period. We believe this provision contemplates the selection of the officers of said board only once during the biennial period. In reaching this conclusion, we have considered the well-settled rules of construction in effect in this

state and have attempted to ascertain the intent of the Legislature in enacting said provision, placing the plain meaning on the language in view of promoting that intention. A primary rule of construction of a statute is to ascertain from the language used the intent of the lawmakers and to put upon the language its plain and rational meaning in order to promote the object and purpose of the statute. *Turner v. Kansas City*, 191 S. W. (2d) 612, l.c. 617; *Donnelly Garment Co. v. Keitel*, 193 S. W. (2d) 577, l.c. 581; *Cummins v. Kansas City Public Service Comm.*, 66 S. W. (2d) 920, l.c. 925.

The time for the selection of said officers is limited to a specific meeting of the board in the biennial period, i.e., that meeting called following the appointment of new members. "New members," as used in this instance, can refer only to members who have been appointed in a biennial period in the place of those members whose terms have expired by operation of law. This is clearly indicated by the use of the plural "members" in Section 10759, supra, and by construing that section in relation with the other related sections. An evident purpose of said provision is to furnish incoming members of said board, who are replacing those members whose terms have expired, a voice in the organization of said board.

To hold that the Board of Regents must reorganize and select new officers every time a new member is appointed to fill a vacancy, other than one created by operation of law because of an expired term, would result in an unreasonable and absurd interpretation of the law. If such were the case, every time a member died, resigned or moved from the district the board would be required to reorganize and select new officers, for example, if one non-officer member of the board died, reorganization would nevertheless be required even though it would serve no purpose. A statute should not be construed in a way to make it unreasonable or to lead to absurd results if it can be given a reasonable construction. *State v. Public Service Commission*, 34 S. W. (2d) 486, l.c. 489; *State v. Irvine*, 72 S. W. (2d) 96, l.c. 100.

We cannot assume that such further reorganization of the board and selection of new officers is necessary or required in the absence of an indication in the terms of the law that the Legislature intended such a purpose. *Wabash R. R. Co. v. United States*, 178 Fed. 5, 101 C.C.A. 133.

Conclusion.

In view of the foregoing, it is the opinion of this department that the Board of Regents of the Southeast Missouri State College in Cape Girardeau, Missouri, should not reorganize at this time and select new officers, but that the Vice President should serve as presiding officer of said Board of Regents during the remainder of the current biennial period.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JB

DD:ml

MOTOR VEHICLES: Invalid's chair with gasoline motor not required to be licensed.

November 22, 1948

FILED

37

11-23

Honorable Leo J. Harned
Prosecuting Attorney, Pettis County
Sedalia, Missouri

- Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Will you please inform me whether or not an invalid's chair driven by a gasoline motor is required to have a license under the laws of the State of Missouri."

Section 8369, Mo. R. S. A. provides: "Every owner of a motor vehicle or trailer, which shall be operated or driven upon the highways of this state, shall, except as herein otherwise provided, cause to be filed* * *an application for registration * * *."

Section 8367, Mo. R. S. A. contains the following definitions to be used in connection with the Motor Vehicle Law: "Motor vehicle- Any self-propelled vehicle not operated exclusively upon tracks, except farm tractors." "Vehicle--Any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power, or those used exclusively on tracks." (Emphasis supplied)

You will note that the definition of vehicle requires that, in order to be subject to the licensing regulations, the device in question must be designed primarily for use on highways. You have not furnished any detailed description of the vehicle about which you have inquired. However, an invalid's chair, as generally constructed, would not, by reason of the attachment of a gasoline motor, become a vehicle designed primarily for use on highways, but would retain the characteristics of a device designed for the purpose of aiding a person, not otherwise physically able to do so, to move from one place to another in the performance of his ordinary activities. Of course, such a device might be incidentally operated upon a highway, but inasmuch as, by

Hon. Leo J. Harned

-2-

definition, the use for which the vehicle was primarily designed determines liability for registration, such incidental use would not render the owner liable to pay the motor vehicle registration fee.

CONCLUSION

Therefore, this department is of the opinion, that by reason of the definition of the word "vehicle" in the Motor Vehicle Act (Section 8367, Mo. R.S.A.), an invalid's chair driven by a gasoline motor is not required to be registered and licensed as a motor vehicle.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:mw

973

SCHOOLS:

Money may not be transferred from Building Fund to
Incidental Fund.

FILED

40

June 30, 1948

7-2

Honorable Roger Hibbard
Prosecuting Attorney
Marion County
Hannibal, Missouri

Dear Mr. Hibbard:

This department is in receipt of your request for an official
opinion which reads as follows:

"Would your office kindly furnish me an opinion
in regard to the following matter:

"Marion County Common School District, No. 4,
some thirty years ago experienced a fire which
destroyed their only school building. Since
that date, no building has ever been erected.
There are, at present, only five children in
the district, all of whom are being sent to
other schools outside the district. There is
little likelihood of any building ever being
erected, due to the limited population of this
district.

"At the time of this fire, the insurance money
in the amount of approximately \$500.00 was turned
over to the Building Fund for the district and
placed in the custody of the County Treasurer.
The members of the school board are desirous
of withdrawing this money from the Building Fund
and placing it in the Incidental Fund so that it
might be used to pay the transportation of the
pupils, which is their only expense.

"In view of Section 10366, Revised Statutes of
Missouri, 1939 and related sections, does the
board have authority to do so?"

It is well settled in this state that the power of the board of
directors of a school district is limited to those expressed in the
statute. Consolidated School District of Jackson County v. Shawhan,
273 S. W. 182.

Section 10366, Laws Missouri 1943, page 893, provides for the various funds in which school district monies shall be placed and further provides under what conditions and for what purposes the monies may be disbursed out of said funds. There is no provision which permits money in the building fund to be transferred to the incidental fund.

Before Section 10366 was amended in 1943 said section provided "that in the event of a balance remaining in the building fund after the purpose for which said fund was levied is accomplished the said board shall have the power to transfer such unexpended balance to the incidental fund."

It is a well established rule of statutory construction that a statute as amended should be construed on the theory that the lawmakers intended to accomplish something by the amendment. State v. Naylor, 40 S.W.(2d) 1079, 328 Mo. 335; State ex rel. Klein vs. Hughes, 173 S. W.(2d) 877, 351 Mo. 651.

As was said in 59 C.J. 1097, " * * * So a change of phraseology from that of the original act will raise the presumption that a change of meaning was also intended, as where material words contained in the original act are omitted from the amendatory act; * * *."

Therefore, the General Assembly in amending Section 10366 omitted the provision which permitted the board of directors of a school district to transfer money from the building fund to the incidental fund, so it must have intended that such board should no longer have this right and power.

CONCLUSION

It is, therefore, the opinion of this department that the board of directors of a school district which has money in the building fund resulting from the payment of insurance on the school building which has burned down may not transfer such money to the incidental fund even though the district does not intend to erect a new school building.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:mw

3-7-47
b.b.
TAXATION OF ACCOUNTS OF
CREDIT UNIONS, H.B. 407,
64th GENERAL ASSEMBLY:

TAX RETURNS:

(1) It is mandatory under H.B. 407, 64th General Assembly, Laws Mo. 1947, page 236, for credit unions to file tax returns on calendar year basis. (2) Tax is to be computed on basis of dividends accruing at the end of the fiscal year occurring in the preceding calendar year. (3) Said H.B. 407 is unconstitutional, in so far as it provides for a 1947 tax based upon dividends declared on Sept. 30, 1946, which last mentioned date was prior to July 1, 1947, the effective date of said H.B., but is constitutional as to taxes for 1948 and succeeding years.

February 5, 1948

Honorable Haskell Holman, Supervisor
Income Tax Unit
Division of Collection
Department of Revenue
Jefferson City, Missouri

7/9



Dear Sir:

We are in receipt of your letter of recent date, in which you request a written opinion of this department. Your letter is as follows:

"It is requested that you furnish this department with a written opinion stating whether or not it is mandatory for Credit Unions in the State of Missouri to file tax returns on the calendar year basis under House Bill 407 as passed by the 64th General Assembly."

We have supplementary verbal information from you to the effect that the question is whether it is mandatory that the return be based on the calendar year as distinguished from the fiscal year, and that you would like for the opinion to cover in a general way the method of computation of the tax and also the constitutionality of the act in so far as it provides for a 1947 tax.

In order to arrive at an answer to these questions presented, it is necessary to consider House Bill No. 407 in the light of other sections of the Credit Union Law. Section 5527, R.S. Mo. 1939, contains the following provision:

"The credit union fiscal year shall end at the close of business on the thirty-first day of December. * * *"

Under this section, therefore, the fiscal year coincided entirely with the calendar year. This section was in full force and effect until repealed by an act of the Legislature approved May 14, 1945. This last mentioned act enacted a new Section 5527 in lieu of the section last above quoted, which new section contains the following language (Section 5527, Laws of Missouri, 1945, page 692):

"The credit union fiscal year shall end at the close of business on the thirtieth day of September. * * *"

Section 5538, R.S. Mo. 1939, which section has never been repealed, contains the following language:

"At the close of the fiscal year a credit union may declare a dividend from the net earnings. * * *"

Section 5542, R.S. Mo. 1939, provides as follows:

"All parties holding stock or shares as owners or in trust in any credit union in this state * * * shall be required to give a just and true list of the same to the assessor, with the actual cash value of each share on the first day of June of each year, and the tax shall be levied upon such shares, and collected from such holder or depositor of the same, as taxes on other personal property; * * *"

House Bill No. 407, now under consideration, repeals this last mentioned Section 5542 and enacts a new Section 5542 in lieu thereof. Section 8 of this new section, being Section 8 of House Bill No. 407, provides as follows:

"This act shall constitute a classification of accounts of credit unions as intangible property, and the annual tax imposed hereby upon the dividends declared and credited to an account, which shall be the annual yield from such account, shall be in lieu of all general property taxes upon their intangible property."

The above mentioned act of May 14, 1945, which, as aforesaid, fixed the end of the credit union fiscal year at the close of business on September 30th, having no emergency clause, had not become effective at the close of business on December 31, 1945, the time when according to the old Section 5527, R.S. Mo. 1939, the fiscal year of 1945 should end, and accordingly the

fiscal year of 1946 commenced immediately thereafter, or, to be more explicit, at the close of business on December 31, 1945. However, the said act of May 14, 1945, had become effective before the close of business on September 30, 1946, the time fixed thereby for the ending of the credit union fiscal year, and accordingly the credit union fiscal year of 1946, which had started at the close of business on December 31, 1945, ended at the close of business on September 30, 1946, covering only a nine months' period.

Having this background in mind, we come to a consideration of House Bill No. 407, Laws of Missouri 1947, Vol. I, page 236, in its entirety. It is clearly apparent that the general objective of this House Bill No. 407, new Section 5542, was the repeal of old Section 5542, R.S. Mo. 1939, providing for a personal property tax on the shares of stock in credit unions and the enactment of a provision for a tax on the taxable portion of the dividends earned by said shares. As indicated by Section 8 of said act above quoted, the new act classifies accounts of credit unions as intangible property.

Section 3 of the act imposes on each person holding an account in a credit union an annual tax of two percent of the taxable portion of the dividend declared and credited to the account of that person "in the preceding year." (Under-scoring ours.) We must first determine what the term "in the preceding year" means as used by said Section 3. We are of the opinion that the term "in the preceding year" means in the preceding calendar year, because we believe it to be a well recognized principle of statutory construction that when a term is used in a statute, and the term is not limited by some qualifying word or term, there is a presumption that the commonly accepted meaning of the English used is intended by the statute, and we are of the opinion that the commonly accepted meaning of the term "year" is calendar year.

If the term "in the preceding year" means in the preceding calendar year, as we believe it does, then the tax that was intended to be payable on or before December 15, 1947, as provided in Section 4 of House Bill No. 407 in the following language, "for the year 1947 this tax shall be payable to the Director of Revenue on or before December 15," is a tax of two per cent on the taxable portion of the dividend declared in 1946. That dividend was declared in accordance with the above quoted Section 5538, R.S. Mo. 1939, on September 30, 1946.

Holding as we do, that the foregoing is the meaning of the term "in the preceding year," we must look again to Section 3 of said House Bill for light as to how the taxable portion of such dividend shall be arrived at. Upon this latter subject, said Section 3 of said House Bill No. 407 provides as follows:

"* * * The taxable portion of such dividends shall be that proportion thereof which shall equal the proportion of the gross income of such credit union for the dividend year derived from its intangible property (other than obligations of or guaranteed by the United States) to its entire gross income."
(Underscoring ours.)

We believe it to be obvious that the term "dividend year," as used by the statute in the last above quoted portion, in so far as the tax intended to be payable on or before December 15, 1947, is concerned, means the fiscal year beginning at the close of business on December 31, 1945, and ending at the close of business on September 30, 1946. We believe this for the reason that, as above set forth, Section 5527, Laws of Missouri 1945, at page 692, provides that the credit union fiscal year shall end at the close of business on the 30th day of September, and that Section 5538, R.S. Mo. 1939, provides, in substance, that a dividend from the net earnings may be declared at the close of the fiscal year.

If it be true then that the term "dividend year," as used by Section 3 of said House Bill No. 407, is synonymous with the term "fiscal year," as used in Section 5527, Laws of Missouri 1945, defining the credit union fiscal year, which in our opinion is true, it is apparent that the "dividend year" referred to in that portion of Section 3 of House Bill No. 407 outlining the method of computing the taxable portion of the dividends upon which the tax was intended to be paid on or before December 15, 1947, is the same as that fiscal year which began, as provided by Section 5527, R.S. Mo. 1939, at the close of business on December 31, 1945, and extended, as provided by Section 5527, Laws of Missouri 1945, page 692, to and including September 30, 1946.

Accordingly the intended method of computing the tax intended to be payable on December 15, 1947, is to compute two per cent of that proportion of the total dividends declared on September 30, 1946, by the credit union which shall equal the proportion of the

gross income of the credit union from the close of business on December 31, 1945, to the close of business on September 30, 1946, derived from its intangible property (other than obligations of or guaranteed by the United States) to its entire gross income for that period of time.

We are further of the opinion that the method of computation provided by this act for determining the tax payable on or before December 15, 1948, and succeeding years is the same as that outlined above for the 1947 tax, with the exception that the computation in these succeeding years is to be made on the basis of dividends declared for a full twelve months' fiscal year ending on the 30th of September of the calendar year preceding the year in which the tax is payable.

We believe that our opinion to the effect that the above quoted words "in the preceding year" applies to the preceding calendar year instead of the preceding fiscal year is supported by the language of Section 6 of said House Bill No. 407, which is as follows:

"If the gross income of a credit union is derived from business carried on both within and without this state, the credit union, in computing the tax, may take credit for the aggregate amount of taxes (other than ad valorem taxes on real estate and tangible personal property) and excises actually paid to such foreign state or states in the calendar year during which the dividends are credited; but the amount of such credit shall not exceed that proportion of the total of the taxes otherwise payable hereunder which equals the proportion that the gross income of such credit union for such year derived from assets or business in a foreign state or states bears to its entire gross income for such year."

We comment with reference to the language last above quoted that, if the term "in the preceding year" used in Section 3 were construed, in so far as the tax intended to be payable on or before December 15, 1947, is concerned, to mean in the fiscal year ending September 30, 1947, this section would be unworkable because, under that construction, the credit union could not take credit for any tax paid to a foreign state in that portion of the calendar year of 1947 which extended beyond the credit union fiscal year which ended on September 30, 1946; but, if said term

"in the preceding year" is construed, in so far as the tax intended to be payable on or before December 15, 1947, is concerned, as we construe it to mean the calendar year of 1946, then said Section 6 of said House Bill would be workable, if not otherwise objectionable, because taxes paid to a foreign state or states in that year were ascertainable in 1947 at the time when the return was intended to be made.

We now come to a consideration of the question as to whether a 1947 tax, based upon dividends declared at the end of a period prior to July 1, 1947, the effective date of said House Bill No. 407, as provided for by said House Bill, is collectible, or, to be more specific, whether said House Bill No. 407 is constitutional, in so far as it provides for taxes based upon such dividends so declared at a time prior to the effective date of the act. With reference to this question, we are of the opinion that said House Bill No. 407 is unconstitutional, in so far as it pertains to the tax intended to be collected in 1947 and intended to be based on dividends declared at the close of the fiscal year which ended on September 30, 1946, because of the provision of the Constitution "that no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation * * * can be enacted." Constitution of Missouri 1945, Article I, Section 13. In this connection, we call attention to the opinion in the case of First Nat. Bank of St. Joseph et al. v. Buchanan County et al., 205 S.W. (2d) 726, which is a case construing the "Bank Tax Act," Laws of Missouri 1945, page 1921. In this case, the said Bank Tax Act was effective on July 1, 1946, and it provided that for the period in the taxable year of 1946 between July 1, 1946, the effective date of the act, and the end of the calendar year the tax shall be measured by the taxpayer's net income for the calendar year of 1945. The court, in discussing the question of the constitutionality of this portion of the Bank Tax Act, used the following language:

"* * * The Constitution of Missouri, the old as well as the new, unlike most constitutions (annotations 11 A.L.R. 518; 109 A.L.R. 523; 118 A.L.R. 1153) provides 'That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, * * * can be enacted.' Const. Mo. 1945, Art. 1, Sec. 13. The Schedule does not indicate that any exception to this provision of the Bill of Rights was intended by the Constitution or contemplated in the General Assembly's effectuating the new tax

pattern. Even though a tax to be assessed and collected in one year on the income of the preceding year 'is a tax for the year of its collection, and not for the year in which the income was received' (61 C.J., Sec. 2331, p. 1581), the tax imposed by the Bank Tax Act, however it is viewed, is retrospective in its operation and could not be effective in the circumstances of this case and in any event prior to July 1, 1946. * * *

CONCLUSION

While we are of the opinion that the aforesaid House Bill No. 407 is unconstitutional, in so far as its provisions for the 1947 tax are concerned, we are of the further opinion that it is constitutional, in so far as its provisions for taxes for the year of 1948 and succeeding years are concerned, and we are of the opinion that returns for those years should be filed on the calendar year basis, and that the computation should be based upon dividends declared on that date in the preceding calendar year marked by the end of the fiscal year ending in said calendar year, which date is September 30th of each year.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General, *J.B.*

SMW:LR

TAXATION: Cannot increase rate of taxation for school purposes
SCHOOLS: at school meeting unless notice of such proposition
is given.

MAGISTRATE Warrant must issue forthwith when information filed
COURTS: unless defendant is voluntarily present at that time.

April 1, 1948

FILED

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4-6

Honorable Marvin C. Hopper
Prosecuting Attorney
Linn County
Brookfield, Missouri

Dear Mr. Hopper:

This is in reply to your letter of recent date requesting the opinion of this department on two questions, which are as follows:

"(1) Under the provisions of Section 10,358, Reenacted Laws 1945, can a 2/3 majority of the qualified voters at the annual school meeting vote to increase the tax rate above the amount authorized by the constitution without voter approval when the notice of the annual meeting was given as directed by Section 10418 but did not state therein that such proposition would be voted on at said meeting?

"(2) When a person voluntarily appears before a Magistrate to answer to a criminal charge or appears before a Magistrate after having received a 'ticket' from a highway patrolman requesting him to do so, is it mandatory that the Magistrate issue a Summons for the arrest of the party or may this be dispensed with?"

The Laws of Missouri, 1945, page 1629, Section 10358, providing the procedure by which the annual rate of taxation authorized by the Constitution may be increased for school purposes, is as follows:

"Whenever it shall become necessary, in the judgment of the board of directors or board of education of any school district in this state, to increase the annual rate of taxation, authorized by the constitution for district purposes without voter approval, or when a number of the qualified voters of the district equal to ten per cent or more of the number casting their votes for the directors of the School Board at the last school election in said district shall petition the board, in writing, for an increase of said rate, such board shall determine the rate of taxation necessary to be levied in excess of said authorized rate, and the purpose or purposes for which such increase is required, specifying separately the rate of increase required for each purpose, and the number of years, not in excess of four, for which each proposed excess rate is to be effective, and shall submit to the qualified voters of the district, at the annual school meeting or election, or at a special meeting or election called and held for that purpose, at the usual place or places of holding elections for members of such board, whether the rate of taxation shall be increased as proposed by said board, due notice having been given as required by Section 10418; and if two-thirds of the qualified voters voting thereon shall favor the proposed increase for any purpose, the result of such vote, including the rate of taxation so voted in such district for each purpose, and the number of years said rate is to be effective, shall be certified by the clerk or secretary of such board or district to the clerk of the county court of the proper county, who shall, on receipt thereof, proceed to assess and carry out the amount so returned on the tax books on all taxable property, real and personal, of such school district, as shown by the last annual assessment for state and county purposes, including all statements of merchants as provided by law." (Underscoring ours.)

According to the above statute, the notice required is notice of the proposition to increase the rate of taxation. The language of the statute is clear and unambiguous and must be given effect as written under the rules of statutory construction. The purpose of such notice is to inform the voters of the proposition to be acted upon at the meeting or election. In State ex rel. School Dist. of Affton v. Smith, 80 S.W. (2d) 858, the Supreme Court of Missouri, sitting en banc, said at page 860:

" * * * It appears from respondent's return that the minutes of the school board show that the board instructed the clerk to post notices of the annual meeting and include therein the proposition of consolidation of the school district. The records kept by the board do not show the contents of the notice which was given, and neither the notice nor a copy thereof is in the possession of the board. In the absence of a showing to the contrary, we will presume that the clerk performed his official duty and gave the notice which the board instructed him to give; that is, a notice submitting the proposition of consolidation of the school district. Such a notice would not authorize the voters when assembled at the annual meeting to vote upon a proposition to organize the common school district into a town or city school district. The two propositions are so radically different that notice of the submission of one would not authorize a vote upon the other. The purpose of a notice is to inform the voters of the propositions to be acted upon at the meeting. Where, as in this case, the statute * * * requires a notice to be given, any action taken by the voters without notice or with an insufficient notice is void. * * *"

Said proposition may be submitted to the voters of the school district at the school meeting when included in the notice of such meeting. Any action taken by the voters without notice or with insufficient notice is void. In Peter v. Kaufmann, 38 S.W. (2d) 1062, the court said at pages 1064 and 1065:

"As to plaintiff's contention that no proper notice had been given embodying these propositions to be voted on at the annual meeting in April, 1927, at which meeting these levies were voted, his contention seems to be only that the school board did not specifically order notices to be posted embodying these propositions to be voted on. * * * * *

* * * * *

" * * * the school board is required to determine the increased rate and submit the question of increase to a vote of the taxpayers, and this may be done at the annual meeting when included in the notice thereof. * * *

* * * * *

"It is these notices which the voters see and consult in order to determine what propositions are to be voted on and decided at the annual meeting, and, if the notices impart intelligent information as to this, that is all that is required."
(Underscoring ours.)

Therefore, the voters of a school district are not authorized, under the provisions of Section 10358, supra, to vote on the proposition to increase the rate of taxation authorized by the Constitution for school purposes, at the school meeting, unless notice that said proposition is to be submitted is included in the notice of such meeting.

We now consider the second question presented. Prosecutions before magistrates for misdemeanors are by informations made by the prosecuting attorney of the county in which the offense may be prosecuted (Laws of Missouri, 1945, page 750, Section 2). The filing of such information has the effect of instigating criminal prosecution. This was recognized by the Supreme Court of Missouri in Ex Parte Bedard, 106 Mo. 616, 1.c. 622:

" * * * The determination of the question here hinges upon the scope and meaning of

the words 'criminal prosecution,' as used in section 4174, supra. We have no doubt they include a criminal information for a misdemeanor, * * *"

Until an information has been filed in the magistrate court no prosecution has been commenced and the magistrate has no jurisdiction in the matter. Upon the filing of an information by the prosecuting attorney it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant (Laws of Missouri, 1945, page 750, Section 5).

The purpose of having a warrant issued and served is that the court may acquire jurisdiction over the person of the defendant. However, we must consider the case where a person voluntarily appears before the magistrate at the time the information against him is filed. In such a case a warrant would serve no purpose. There would be no need for a warrant to be issued commanding the proper officers to bring the defendant before the court. The defendant would already be before the court and under its jurisdiction. The reason for or purpose of a warrant would not be present. We do not believe it is the contemplation of the law to require the performance of an unnecessary or useless act. In the case of State of Missouri v. William Cook, 58 Mo. 546, it was said at page 547:

"It is shown that at the time the indictment was returned the defendant was in court, and pleaded not guilty; he then gave a bond for his appearance, and petitioned for a change of venue, which was awarded in accordance with his application. Under these circumstances, no capias for his arrest was necessary. It would have been an idle and unmeaning ceremony. * * *"

Therefore, where a defendant is present before the magistrate court at the time the information is filed, the issuance of a warrant for the arrest of said defendant may be dispensed with by the magistrate.

Conclusion.

In view of the foregoing, it is the opinion of this department that the proposition to increase the rate of taxation

authorized by the Constitution for school purposes cannot be submitted at the school meeting unless notice of the submission of said proposition is included in the notice of such meeting.

It is further the opinion of this department that when an information is filed it is the duty of the magistrate to forthwith issue a warrant for the arrest of the defendant; however when the defendant is voluntarily present before the magistrate at the time the information is filed a warrant need not be issued.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

DD:ml

MAGISTRATE COURTS: Magistrates cannot give instructions in civil cases.

FILED

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May 20, 1948

5-21

Honorable A. B. Hoy
Judge of the Probate Court
Saline County
Marshall, Missouri

Dear Judge Hoy:

This is in reply to your letter of recent date requesting the opinion of this department on the following question:

"May a magistrate give instructions or declarations of law in the trial of civil cases?"

Instructions of the court on points of law involved in a case are statutory in nature, and therefore authorization must be found in the statutes before a court can give such instructions. The law relating to magistrate courts, found in Laws of Missouri, 1945, page 765, as amended, does not contain such authorization. Section 101 of said act, found in the Laws of Missouri, 1945, page 795, provides that in some cases the trial of suits before magistrates shall be governed by the usage and practice in the circuit court. Said section is as follows:

"The proceedings upon the trial of suits before magistrates with respect to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial, shall, when no other provision is made by law, be governed by the usage and practice in the circuit court, so far as the same may be applicable." (Underscoring ours.)

Section 1118, R. S. Mo. 1939, provides that the court may give instructions on any point of law arising in a cause. However, it will be noted that said Section 101, supra, expressly authorizes the proceedings upon the trial of suits before

magistrates, when no other provision is made, to be governed by the usage and practice in the circuit court with respect only to the examination of witnesses, the submission of evidence and argument, and the order and conduct of the trial. There is no provision authorizing the circuit court procedure and practice with respect to giving instructions or declarations of law to be followed in the magistrate court. By the express words of the statute the magistrate court is told what circuit court procedure and practice may be followed in the magistrate court. Therefore, no other circuit court procedure and practice can be employed in the magistrate court. When special powers are conferred, it is well settled that such authority operates to the exclusion of any other power. The expression of one thing implies the exclusion of another thing. *Kroger Grocery & Baking Co. v. City of St. Louis*, 106 S. W. (2d) 435, l.c. 439; *Lancaster v. Atchison County*, 180 S. W. (2d) 706, l.c. 709; *Kansas City Mo. v. J. I. Case Threshing Machine Co.*, 87 S. W. (2d) 195, l.c. 205; *State v. Smith*, 111 S. W. (2d) 513, l.c. 514.

This interpretation is in harmony with the obvious intent of the Legislature as an analogous situation is found in Laws of Missouri, 1945, page 750, Section 29, relating to the jurisdiction and procedure of magistrate courts in cases of misdemeanors. There it is provided that no instructions or declarations of law shall be given by the magistrates in proceedings upon the trial of misdemeanors.

Conclusion.

It is therefore the opinion of this department that magistrates are not authorized to give instructions or declarations of law in the trial of civil cases.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ml

APPROPRIATIONS: That part of Sec. 3.040 of House Bill No. 449 of the 64th General Assembly appropriating \$100,000 for purchase, installation and operation of equipment necessary to administration of Permanent Registration Law does not authorize payment of any salaries out of such appropriation.

May 24, 1948



Mr. B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"Section 3.040, House Bill 449, 64th General Assembly provides an appropriation for the collection of motor vehicle registration fees, drivers license, and the fuel tax for the period beginning July 1, 1948 and ending June 30, 1949. This appropriation includes the usual items of personal service, additions, repairs and replacements, and operation. However, for the next fiscal year another item has been included which reads as follows:

'For the purchase, installation and operation of equipment necessary to the administration of the Permanent Registration Law\$100,000.00'

"We will appreciate an opinion as to whether or not salaries could be charged to this latter appropriation along with other items of expense necessary to the administration of the law."

Section 23 of Article IV of the Constitution of Missouri provides, in part, as follows:

" * * * Every appropriation law shall distinctly specify the amount and purpose of

Mr. B. H. Howard

the appropriation without reference to any other law to fix the amount or purpose."

Section 3.040 of House Bill No. 449 of the 64th General Assembly provides, in subsection A, an appropriation for salaries of various enumerated employees and "all other necessary employees," subsections B and C provide for additions, repairs and replacements, and subsection D provides for operation of the department, and in addition thereto is found the following:

"For the purchase, installation and operation of equipment necessary to the administration of the Permanent Registration Law \$100,000.00"

In the case of State v. Weatherby, 129 S. W. (2d) 887, the Supreme Court held that compensation for personal services in rendering official opinions could not be paid by the Attorney General out of the appropriation for "operation." The court said, 1. c. 894:

" * * * By distinctly specifying the sums appropriated for enumerated personal services rendered the Legal Department, the General Assembly evidenced an intent within Sec. 19, Art. 10, of our Constitution, Mo. St. Ann., in the enactment of said Sec. 7 not to pay for 'personal service' out of moneys appropriated for 'operation' of the Legal Department."

We believe it to be clear that the use of the word "operation" in the above-quoted provision of Section 3.040 with regard to the administration of the Permanent Registration Law can mean only the general expenses of running such equipment, such as the general expenses enumerated under subsection D of Section 3.040, that is, such expenses as the materials and supplies necessary in using such equipment in order to carry out the Permanent Registration Law of this state. We believe that this conclusion is sustained by the action of the Legislature in providing, in subsection A of Section 3.040, for the payment for personal services of all those employees enumerated and of "all other necessary employees."

CONCLUSION

It is the opinion of this department that that part of Section 3.040 appropriating \$100,000 for the purchase installation and operation of equipment necessary to the administration of the

Mr. B. H. Howard

Permanent Registration Law does not authorize the payment out of such appropriation of any salaries.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BLIND PENSIONS: Construing Section 9457, page 1350, Laws of Missouri, 1945, relative to the payment of accrued unpaid balance upon the death of a recipient, to the legal representatives of such pensioner.

May 29, 1948

FILED

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6-1
Department of Revenue
State of Missouri
Jefferson City, Missouri

Attention: Mr. B. H. Howard
Comptroller

Gentlemen:

This will acknowledge receipt of your request for an opinion which reads:

"Laws of 1945, Section 9457, Page 1350 provides in part that 'in case any pensioner shall die, having an accrued unpaid pension, the amount thereof shall be paid to the legal representatives of such pensioner'. This part of the section was copied from the Revised Statutes of 1939 and we presume that it has been in effect for many years.

"In most cases the pensioner has little or no estate other than the small amount of the pension which has accrued to him during the month of his death. It has been the practice in the past to furnish a member of the pensioner's family with a copy of the enclosed form and have someone appointed legal representative by the probate judge. In a recent case Judge Herbert Taylor, Probate Judge of Christian County, has raised the question as to his authority to appoint a legal representative to receive the accrued pension. In this case the person who wished to be appointed is the son of the pensioner and is not a minor.

"We will appreciate an opinion as to the proper procedure to be followed in order for the son to collect the accrued pension."

Department of Revenue
State of Missouri
Jefferson City, Missouri
Attn: Mr. B. H. Howard

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Section 9457, page 1350, Laws of Missouri, 1945, provides that if any pensioner shall die, having an accrued unpaid balance, the amount thereof shall be paid to the legal representatives of such pensioner. The Act does not again refer to who shall be the legal representative, or how same shall be appointed. Said Section reads:

"Section 9457. Comptroller to supply quarterly requisitions to be filed by applicants for pensions.-- The comptroller shall supply to all persons appearing upon the blind pension roll, suitable blank forms for monthly requisitions for pensions, containing, among other things, a statement that requisitioner is the recipient of the pension personally and that he or she has the free and full use of such pension, and that the same is devoted exclusively to his or her needs, giving present address; and each pensioner shall forward each requisition for pension last accrued to the comptroller who shall certify the claim to the state auditor who shall draw his warrant in favor of such pensioner upon the state treasurer for any moneys in the treasury available therefor and forward same to pensioner or the legal guardian thereof at such postoffice address: Provided, that where such pensioner is under legal guardianship, such requisition may be made by the guardian; and in case any pensioner shall die, having any accrued and unpaid pension, the amount thereof shall be paid to the legal representatives of such pensioner; and in case any pensioner should abandon his or her residence in this state, having an accrued and unpaid pension, upon requisition, as herein provided, such unpaid amount shall be forwarded to the address of such pensioner or the legal guardian thereof."

The legal representative has been defined often depending upon the particular manner in which the words are used. In this instance, since the Blind Pension Law itself does not establish any particular procedure which may prevent the estate of a blind pension recipient from being administered in the Probate Courts of this State,

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State of Missouri
Jefferson City, Missouri
Attn: Mr. B. H. Howard

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we believe the laws dealing with the administration of estates in the Probate Court should be construed along with Section 9457, supra, relative to the payment of any accrued unpaid balance to the legal representatives of such pensioner. Especially should these laws be construed together, in view of the fact that it is necessary before anyone be placed upon the blind pension roll that he file an application with the representative of the Commission, or the Probate Court. (See: Section 9454, R.S. Mo. 1939).

In the absence of a deceased recipient leaving a will, the Probate Court is authorized to grant letters of administration appointing an administrator in said estate. However, in certain instances, this procedure is optional with the Probate Court. Section 2, page 289, Laws of Missouri, 1941, prescribes the condition and circumstances when a Probate Court may refuse to grant letters of administration. Said Section reads:

"Section 2. Letters Not Granted--When.--
Letters Not Granted--When--The probate court, or judge thereof in vacation, in its or his discretion, may refuse to grant letters of administration in the following cases: first, when the estate of the deceased is not greater in amount than is allowed by law as the absolute property of the widower, widow or minor children under the age of eighteen years: second, when the estate of the deceased does not exceed one hundred (\$100.00) dollars and there is no widower, widow or children under the age of eighteen years, any creditor of the estate may apply for refusal of letters by giving bond in the sum of one hundred (\$100.00) dollars, said bond to be approved by the probate court or judge thereof in vacation, conditioned upon such creditor obligating himself to pay, so far as the assets of the estate will permit, the debts of the deceased in the order of their preference. Proof may be allowed by or on behalf of such widower, widow, minor children or creditor before the probate court or judge thereof of the value and nature of

Department of Revenue
State of Missouri
Jefferson City, Mo.
Attn: Mr. B. H. Howard

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such estate, and if such court or judge shall be satisfied that no estate will be left after allowing to the widower, widow or minor children their absolute property, or that the estate does not exceed one hundred (\$100.00) dollars when application is made by a creditor, the court or judge may order that no letters of administration shall be issued on such estate, unless, upon the application of other creditors or parties interested, the existence of other or further property be shown. And after the making of such order, and until such time as the same may be revoked, such widower, widow, minor children or creditor shall be authorized to collect and sue for all the property belonging to such estate; if a widower, widow or creditor, in the same manner and with the same effect as if he or she had been appointed and qualified as executor or executrix of such estate; if minor children under the age of eighteen years, in the same manner and with the same effect as now provided by law for proceedings in court by infants in bringing suit; provided also, that the widower, widow or minor children under the age of eighteen years may retain the property belonging to such estate and the creditor shall apply the proceeds thereof to debts of the estate in the order in which demands against the estate of deceased persons are now classified and preferred by law. Provided further, that any person who has paid the funeral expenses or other debts of deceased shall be deemed a creditor for the purpose of making application for the refusal of letters of administration under this section and be subrogated to the rights of such original creditor."

It will be noticed that the Legislature in enacting Section 2, supra, provided that the Probate Court in its or his discretion may refuse letters of administration in certain cases, by the use of the word "may" preceded by the words "in its or his discretion" referring to the Probate Court, we are of the opinion under well established rules of statutory construction, that it is discretionary

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Attn: Mr. B. H. Howard

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with the Probate Court whether said Court refuses to grant letters of administration in such cases or does grant letters of administration. If the Legislature had used the word "shall" instead of "may", and had not specifically left the matter to the discretion of the Probate Court, there would be no question but that it was a mandate to said Court to refuse to grant letters of administration in certain instances. (State ex rel. Coleman vs. Blair, 151 S.W. 148, 1.c. 151, 245 Mo. 680; also see: Lansdown vs. Paris, 66 Fed. (2d) 939, 1.c. 941).

In Ordelheide vs. Modern Brotherhood of America, 158 Mo. App. 677, 1.c. 685, an action was brought by an administrator to recover the amount, with interest, of what plaintiff called a life insurance policy and the defendant called a benefit certificate issued by a fraternal benefit society, for \$1,000.00. The policy or certificate was issued to plaintiffs' intestate, and was payable to his "legal representatives related to the members as---" The Court held that the words "legal representatives" must mean executors or administrators, and in so holding, said:

"We are not impressed by the suggestion that the designation 'legal representatives' must be construed to mean, not the executor or administrator of the insured, but some one of the classes authorized by our statute. The words 'legal representatives' must be construed to mean 'executors or administrators,' in the absence of anything showing a different intent. (New York Life Ins. Co. v. Kansas City Bank, 121 Mo. App. 479, 97 SW 195; Walker v. Peters, 139 Mo. App. 681, 124 S.W. 35.) Here, there is a total absence of anything showing such different intent. There is not even a suggestion that the insured had any family, heirs, blood relatives, affianced wife, or dependents. There is nothing disclosed concerning him, except that he was a young man twenty-two years of age. The only expression disclosed of his desire in the premises is contained in the application to the effect that the beneficiary should be his 'legal representatives.' The omission to strike out from the certificate

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the words 'related to the insured as . . . ' can hardly be considered an expression of an intention that the 'legal representatives' should be related to the insured in some one of the authorized classes. It is plain that these words and blank were part of the printed form and were left unerased through mere inadvertance. This is altogether too meagre a circumstance, if any at all, to justify an interpretation avoiding a contract which should be liberally interpreted in favor of the insured."

In Thompson vs. United States, 20 Ct. Cl. 276, 1.c. 278, the Court also held that the words "legal representatives" in the absence of anything appearing in the context of the Act must be held to mean administrators or executors, and said:

"The ordinary meaning of the words 'representative,' 'legal representative,' 'personal representative,' is, that they refer to the person constituted representative by the proper court, and the onus is upon those attempting to maintain a different construction to show a different meaning. (2 Jarman on Wills, 120; Holloway v. Clarkson, 2 Hare, 523; 118 Mass., 198; Bouvier Law Dictionary, vol. 2, 410-576.)

"In the absence of anything appearing in the context, those words found in a statute or written instrument must be held as meaning the administrator or executor. * * * "

Also, Thompson vs. Smith, 103 F. (2d) 936, 1.c. 938, 70 App. D.C. 65, 123 A.L.R. 76, wherein the Court said:

"The statute is not lacking in clarity. The phrase 'legal representatives' has an accepted meaning which includes 'executor.' See Briggs v. Walker, 1898, 171 U.S. 466, 19 S. Ct. 1, 43 L. Ed. 243. In that case the Supreme Court said, at

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page 471, 19 S. Ct. at page 3: 'The primary and ordinary meaning of the words "representatives," or "legal representatives," or "personal representatives," when there is nothing in the context to control their meaning, is "executors or administrators," they being the representatives constituted by the proper court. (Citing authorities)' See also 2 Jarman, Wills (7th ed. 1930) 1585; 2 Williams, Executors (12th ed. 1930) 729; Page, Wills (1901) Sec. 533."

Also, in the case of Hogate v. Hogate, 28 A. (2d) 769, 1.c. 771, the Court held that generally, words "legal representatives" when applied by testor to personality signifies executor and administrator, and when applied to realty, those upon whom the law casts the real estate immediately upon the death of the ancestor.

In view of the foregoing decisions defining "legal representatives" we are inclined to believe that the Legislature in enacting Section 9457, supra, fully intended the words as used therein, to mean administrator or executor in the absence of any other provision in the law specifically excluding administration on such estates, under the established Probate Court procedure in Missouri. The Legislature could have made an exception in the case of estates of such recipients, but we cannot find wherein the Legislature did exempt such estates.

CONCLUSION.

Therefore, it is the opinion of this Department that by using the words "legal representatives" in Section 9457, page 1350, Laws of Missouri, 1945, the Legislature intended that such words were to mean administrator or executor as the case may be, and in the absence of such appointment by the Probate Court any accrued unpaid pensions cannot be paid.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

ARR:ir

J.B.

APPROPRIATIONS: Members and secretary of Industrial Commission of Missouri are to be compensated for the period July 1, 1948, to July 19, 1948, from funds appropriated under Sec. 4.270 of House Bill No. 450 of 64th General Assembly.

FILED

42

June 17, 1948

6-21

Honorable B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Sections 3 and 4, Laws of 1945, Page 1103 provides that the members and the secretary of the Industrial Commission shall be paid from the following sources; 40% from the Unemployment Compensation Administration Fund, 40% from the Workmen's Compensation Fund, 6% from the Mining Department Fund, and 14% from General Revenue.

"Senate Bill #220, 64th. General Assembly repeals the above mentioned sections and enacts two new sections in lieu thereof. These new sections provide that the members and secretary shall be paid 40% from the Unemployment Compensation Administration Fund, and 60% from General Revenue. Senate Bill #220 will become effective July 19, 1948.

"Section 4.270, House Bill #450, 64th. General Assembly appropriates money for the salaries of the members and the secretary of the Industrial Commission in accordance with the percentage stated in Senate Bill #220 for the period beginning July 1, 1948 and ending June 30, 1949. No appropriation was made to cover the salaries provided for in the Laws of 1945 during the period between June 30, 1948 and July 19, 1948, the

date the new percentage basis becomes effective.

"In view of the above conflict, we will appreciate an opinion as to the basis for computing the salaries of the members and the secretary of the Industrial Commission for the month of July 1948."

You have inquired about the payment of the salaries of both the members of the Industrial Commission of Missouri and the secretary of such commission. However, in this opinion we have considered in the body thereof only the sections applicable to the members, as the statutes relating to the secretary are similar.

Section 3 of an Act found Laws of Missouri, 1945, page 1101, reads as follows:

"Each member of the Commission shall be paid a fixed monthly salary at the rate of Seven Thousand Five Hundred Dollars (\$7,500.00) per year. The salaries of the members of the Commission shall be paid from the following sources: 40% from the Unemployment Compensation Administrative Fund, 40% from the Workmen's Compensation Fund, 6% from the Mining Department Fund, and 14% from the General Revenues of this State." (Emphasis ours.)

In conformity with the percentages established by the above statute relating to the sources of the funds from which the salaries of the members of the Industrial Commission are to be paid, the Legislature appropriated an amount sufficient to pay such salaries, prorated according to such percentages from the various funds. This appropriation will expire on June 30, 1948, and at that time will have been completely exhausted.

Section 3 of the Act found Laws of Missouri, 1945, page 1101, quoted supra, was repealed by Senate Bill No. 220 of the 64th General Assembly, such repealing act becoming effective July 18, 1948. Section 3 of the repealing and reenacting bill reads as follows:

"Each member of the Commission shall be paid a fixed monthly salary at the rate of Seven Thousand Five Hundred Dollars (\$7,500) per

annum. The salary of each member of the Commission shall be paid from the following sources: Three Thousand Dollars (\$3,000) per annum from the Unemployment Compensation Administration Fund for services rendered the Division of Employment Security, and Four Thousand Five Hundred Dollars (\$4,500) per annum from the General Revenue of the State." (Emphasis ours.)

In conformity with the last-quoted statute, the 64th General Assembly enacted Section 4.270 of House Bill No. 450, reading, in part, as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the funds as hereinafter specified, the sum of Twenty-seven Thousand Dollars (\$27,000.00) for the purpose of paying the salaries of the members and secretary of the Industrial Commission of the Department of Labor and Industrial Relations; for the period beginning July 1, 1948 and ending June 30, 1949, as follows:

"A. PERSONAL SERVICE:

Salaries of the members of the Industrial Commission, payable out of funds as follows:

Out of General Revenue
Fund..... \$13,500.00

Out of Unemployment Compensation Administration Fund..... \$9,000.00

Total Salaries of Members of Industrial Commission.....\$22,500.00

* * * * *

You will note that the only effect of such repeal and reenactment and the passage of the appropriation bill set out is to change the percentages and sources of the funds out of which

the members of the Industrial Commission are to be paid and to provide an appropriation for the fiscal year ensuing the first day of July, 1948, from funds in accordance with such changed percentages and sources. Your attention is also directed to the fact that such salaries are payable upon a fixed monthly basis and that the first of such fixed monthly salaries will become due subsequent to the effective date of Senate Bill No. 220 of the 64th General Assembly.

In the light of the foregoing, your inquiry resolves itself into this question: Are the funds appropriated under Section 4.270 of House Bill No. 450 of the 64th General Assembly available for the payment of the salaries of the members of the Industrial Commission when the first of such fixed monthly salaries become due upon July 31, 1948? We believe that such appropriation is so available and that without regard to the fact that under the prior Act the salaries for the first eighteen days of such month were to be derived from different sources than upon the due date of the first monthly salary.

The Legislature has so construed the Act by having made the appropriation under Section 4.270 of House Bill No. 450 of the 64th General Assembly, as reference thereto indicates that in making such appropriation the percentages and funds affected thereby are in accordance with the new Act. The amounts so appropriated from the several funds are mathematically sufficient, and no more and no less, to pay the annual salaries of the three members of the Industrial Commission. This construction placed upon the statute by the Legislature is entitled to some weight.

As declared in State ex rel. Davis v. Smith, 75 S. W. (2d) 828, the power of the Legislature over the public funds of the state is supreme, subject to constitutional restrictions. The court therein said:

"Relator makes a contention that the power of the General Assembly with respect to the public funds raised by general taxation, subject to express constitutional limitations, is supreme. In this connection it is also contended that the Constitution does not restrict the power of the Legislature to make appropriations from the general revenue to compensate public officers for services rendered the public and reimburse them for expenses incurred in the performance of such service.

"We agree that the power of the Legislature over these matters, subject to constitutional limitations, is supreme. We also agree that the Constitution does not prevent the Legislature from providing that public officers' salaries and expenses shall be paid out of the general revenue.

* * *

The case mentioned might be urged as authority for adopting a contrary view to that expressed in this opinion. The factual situation presented in the case involved the payment of the salary of a member of the Board of Barber Examiners. This board had been created under a statute authorizing the payment of the salaries of the members thereof out of moneys collected by the board and "out of this fund only." Without repeal of this statute or amendment thereto, a subsequent Legislature attempted to appropriate out of the general revenue of the state an amount sufficient to pay the salaries of the board members. Upon the refusal of the State Auditor to use any of such money for the payment of salaries, mandamus was brought. The writ was denied, the court reasoning the Legislature was without power to make such an appropriation in the face of the statute creating the board and providing for the payment of such salaries solely from funds collected by such board.

We do not consider this case to express a view different from that set forth in this opinion. Rather, we think the following quotation from the case supports the view which we have herein expressed:

" * * * This being true, the Legislature had authority to provide that all or any specified part of the salary and expenses of the barber board should be paid out of the general revenue, but it did not do so. On the contrary, it has provided, in express terms, by section 13525, R. S. 1929 (Mo. St. Ann. section 13525, p. 637), that the salaries and expenses of such board shall be paid by warrants drawn against the fund created from fees collected by the board and paid into the state treasury, and against that fund only. The Legislature could, at any time, provide a different method for paying the salaries and expenses of this board by amending section

13525 or by repealing it and enacting a new law in lieu thereof, but until it does so, section 13525, R. S. 1929 (Mo. St. Ann. sec. 13525, p. 637), remains the law of the state. We cannot escape the conclusion that if section 13525, R. S., is still the law, and if it provides that the salaries and expenses of the board shall be paid out of the fund created from the fees collected by the board, and out of that fund only, the attempt to appropriate money out of the general revenue fund to pay any part of such salaries or expenses is contrary to the existing law of the state, as declared in section 13525, supra." (Emphasis ours.)

You will note that the emphasized portion of the quotation clearly indicates that had the existing statute been repealed or amended, the appropriation would have been valid. In the present case, that is exactly what has occurred and we think such action was within the power of the Legislature.

Since provisions relating to the salary of the secretary of the Industrial Commission of Missouri are quite similar to those heretofore quoted, we arrive at the same conclusion with respect thereto.

CONCLUSION

In the premises, we are of the opinion that payment of the salaries of the members and secretary of the Industrial Commission of Missouri for the month of July, 1948, and subsequent months of the fiscal year 1948-1949 may lawfully be made from the funds appropriated under Section 4.270 of House Bill No. 450 of the 64th General Assembly.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JTB

WFB:HR

MAGISTRATES: Magistrate may raise salary of clerk
MAGISTRATE CLERKS: when assessed valuation is finally
placed at higher level.

FILED

42

July 2, 1948

7-2
Honorable B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Mr. Howard:

This is in reply to your letter of recent date in which you enclosed a letter from Honorable Walter A. Eggers, Probate Judge of Perry County, which presented the following question:

If the assessed valuation of a county is raised and authorizes an increase in the salary of the clerk of the magistrate court, when should such increase be made effective?

It is provided in the Laws of Missouri, 1947, Volume I, page 240, Section 21, that each magistrate shall, by an order duly made and entered of record, appoint and fix the salary of a clerk of his court, which salary shall not exceed the annual amount fixed in the act of the Legislature, commonly known as the Magistrate Law, for clerk hire of such court.

The Laws of Missouri, 1945, page 765, Section 22, provide that salaries of clerks shall be paid by the state within the limits provided in that section upon requisition filed by the judge of the magistrate court. That section then sets up a salary scale based on the population and assessed valuation of all counties.

The Laws of Missouri, 1945, page 765, Section 17, provide for the salaries of magistrates, and also set up a salary scale based on the population and assessed valuation of all counties. For the purposes of this provision, the assessed valuation of all real and tangible personal property in the respective counties as last determined by the commission or other body provided by law for the equalization of taxes as between the counties, is the assessed valuation which is controlling in the

matter. The salary of a magistrate for his entire term is determined on the basis of the assessed valuation as determined for the year next prior to the year for election of such magistrate. However, there is no such restriction in Section 22, supra, requiring the clerk of a magistrate court to receive a fixed salary for and during the entire period he acts as clerk of the magistrate court. This is especially true in view of the fact that such clerk serves only at the pleasure of the magistrate and has no fixed term of office. Therefore, his salary is subject to change at any time in the discretion of the magistrate and within the limits provided by law.

The final power to equalize the valuation of real and tangible personal property in the several counties is vested in the State Tax Commission. The pertinent parts of Section 11033.14, Mo. R.S.A., in this matter are as follows (Laws of Missouri, 1947, Volume I, page 549, Section 15):

"It shall be the duty of the State Tax Commission, and the commissioners shall have authority to perform all duties enumerated in this section and such other duties as may be provided by law:

(1) Between the dates of June 20 and the second Monday in July, 1946, and between the same dates each year thereafter, the State Tax Commission shall equalize the valuation of real and tangible personal property among the several counties in the State * * * * *

"(2) The secretary of the State Tax Commission shall transmit to each county clerk and to the assessor in the City of St. Louis a report showing the per centum added to or deducted from the valuation of the property of his county, specifying the percentage added to or deducted from the real property and the tangible personal property respectively, denoted by classes, and also the value of the real and tangible personal property of his county as equalized by said Commission; and the said clerk shall furnish one copy thereof to the assessor, and except in St. Louis City one copy shall be

laid before the annual county Board of Equalization. This report shall be delivered to the clerks of the several counties so that it may be in the possession of county Boards of Equalization on or before the second Monday in July. The Assessor in St. Louis City shall make such adjustments of property valuations as directed by the State Tax Commission. * * *

Thus, when upon final determination, according to the statutory procedure, that the assessed valuation of a county is raised to a level which will justify an increase in the salary of the clerk of the magistrate court, under provisions of Section 22, supra, the judge of the magistrate court is authorized within his discretion to raise the salary of such clerk in accordance therewith.

Conclusion.

Therefore, it is the opinion of this department that if the assessed valuation of a county is raised, and such higher valuation authorizes an increase in the salary of the clerk of the magistrate court, such salary may be increased in accordance with the Laws of Missouri, 1945, page 765, Section 22, upon the final action of the proper authorities in placing the assessed valuation of such county at a higher level.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

DD:ml

C. 8/25
P. 4 10/28
TAXATION: Refund of Missouri Motor Fuel Tax may not be made to
REVENUE: Veterans Administration from money appropriated under
Section 3.060 of House Bill No. 172 of the 64th General Assembly.

July 22, 1948

FILED

42

7-22
Honorable B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this Department reading as follows:

"We are enclosing copy of a claim for motor fuel tax refund by the Kansas City Office of Veterans Administration. This claim covers the tax on fuel purchased by veterans who were authorized to travel at government expense for various purposes. The claim is supported by receipts for the individual purchases.

"We will appreciate an opinion as to whether or not a claim of this nature can be paid under the appropriation for refunding of gasoline taxes, Section 3.060, House Bill 172, 64th. General Assembly."

We have examined the correspondence attached to your request, together with a photostatic copy of the claim for refund. It is noted that the gasoline tax included in the claim for refund has been paid by employees of the Veterans Administration in connection with travel at government expense. Such employees are reimbursed for such expenditures by the employer. The basis for the refund is said to be Public Law No. 819 of the 76th Congress, approved October 9, 1940.

Section 3.060 of House Bill No. 172 of the 64th General Assembly reads as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the State Highway Department Fund, One Million Fifty Thousand Dollars (\$1,050,000.00) for the purpose of refunding of gasoline taxes, as provided by law, for the period beginning July 1, 1947, and ending June 30, 1948."

We have examined the Federal statute referred to, as well as numerous cases and text authorities, respecting the power of the various states to impose excise taxes, such as the Missouri Motor Fuel Tax, upon purchases, directly or indirectly paid for out of public funds of the United States. However, in view of the wording of the Missouri statutes relating to such tax, we do not consider it necessary to determine whether or not such tax may lawfully be collected in the first instance. It is our thought that no provision has been made for a refund under the circumstances outlined in the present claim.

Section 8411.2, Mo. R.S.A., which levies the Missouri Motor Fuel Tax, contains the following sub-section (f):

"(f) No tax shall be imposed, charged or collected with respect to the following:

"(2) Motor fuel sold to the United States of America or any agency or instrumentality thereof."

(Underscoring ours.)

Assuming, but not so determining, that sales of motor fuel made to employees of the Veterans Administration are within the purview of the above quoted exemptions provision, it becomes apparent that such tax should not have been collected in the first instance. It therefore but remains to be determined whether or not any provision has been made for the refund of such tax so paid.

We have examined the pertinent sections relating to refunds, and do not find that any of such statutory provisions apply to the facts now under consideration. For instance, sub-section (g) of Section 8411.2, Mo. R.S.A. provides that a distributor who has made a sale exempted under the provisions of paragraph 2 of sub-section (f) quoted, supra, may deduct

from the gallonage on which his liability is computed for payment of the motor fuel tax, all gallonage so sold. This provision reads, in part, as follows:

"(g) Each distributor having received motor fuel which is thereafter exported, sold, used, lost or destroyed, as set forth under paragraphs (1) to (6) inclusive above shall, upon furnishing such proof thereof as the administrator shall by regulation require, be entitled to deduct from the gallonage on which his liability for payment of the motor fuel tax would otherwise be computed all gallonage so exported, sold, used, lost or destroyed. * * * ."

Further, Section 8411.15, Mo. R.S.A., provides for the refund of tax collected on motor fuel thereafter lost or destroyed. To the same effect is Section 8411.16, Mo. R.S.A., providing for the refund of the amount of tax paid upon fuel not used in motor vehicles operated upon the public highways of the state. Section 8411.17, Mo. R.S.A., authorizes the refund of taxes erroneously paid the State of Missouri by distributors. It therefore appears that no provision has been made for the refund of taxes paid upon transactions exempted under the provisions of paragraph 2 of sub-section (f) of Section 8411.2, Mo. R.S.A.

CONCLUSION.

In the premises, we are of the opinion that refund of Missouri Motor Fuel Tax may not be made out of funds appropriated under Section 3.060 of House Bill No. 172 of the 64th General Assembly to the Veterans Administration, based upon taxes paid by employees of such Federal agency when engaged in travel authorized at government expense, even though reimbursement of such payment is made by such employer.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR *J.E.*
Attorney General

WFB:ir

APPROPRIATIONS: Deficiency in sum appropriated under Sec. 2.093 of House Bill 448 of the 64th General Assembly to be prorated among all counties of the state.

FILED

42

August 10, 1948

8-19

Mr. B. H. Howard, Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Senate Bill 177, page 504, Senate Bill 178, page 506 and Senate Bill 257, page 509, Laws of 1947 provides that the State shall pay \$600.00 annually to second, third and fourth class counties for partial compensation of the county superintendent of schools for preparing the school budget.

"Senate Bill #256 which became effective July 19, 1948 provides for like payments to counties of the first class.

"Section 2.093, page 27, Appropriation Laws of 1948-49 appropriates \$67,200.00 to cover these annual payments. This is sufficient to pay 112 counties, although, an additional two counties are entitled to a portion of \$600.00, effective July 19, 1948, these two being St. Louis County and Jackson County which were covered by Senate Bill 256.

"We will appreciate an opinion as to whether we should pay each of the 114 counties its proportionate share of the \$67,200.00 appropriated or pay \$600.00 to each of the 112 counties of the second, third and fourth class with the expectation that the legislature will appropriate an additional \$1200.00 to pay St. Louis County and Jackson County."

We have examined Senate Bills 177, 178 and 257 of the 64th General Assembly, referred to in your letter, and find that, in substance, such bills provide for an increase in the salaries of the county superintendents of schools in counties of the second, third and fourth classes, and for the reimbursement by the State of Missouri to the several counties comprising such classes of the sum of \$600.00 per annum for such increases. The first two bills mentioned were approved by the Governor on June 6, 1947, and the last on July 7, 1947. Senate Bill 256 makes the same provision with respect to counties of the first class, but did not become effective until July 19, 1948.

Section 2.093 of House Bill 448 of the 64th General Assembly reads as follows:

"There is hereby appropriated out of the state treasury, chargeable to that part of the general revenue set apart for support of free public schools in Missouri, the sum of Sixty-seven Thousand Two Hundred Dollars (\$67,200.00) to pay the compensation of the county superintendents of schools for the preparation of school district budgets, as provided by law; for the period beginning July 1, 1948 and ending June 30, 1949."

A simple mathematical calculation discloses that the sum appropriated under this bill would serve to reimburse all counties of the second, third and fourth classes, but would be insufficient to reimburse all counties of the state if those of the first class were included.

The question presented, then, is whether such appropriation should be used for reimbursing all of the counties of the state pro rata, thereby allocating a proportionate share of the deficiency to each of the several counties, or whether it should be used to pay in full 112 of the counties.

We wish to observe, at the outset, that no "claims" against the State of Missouri, in the technical sense, will or could arise against the state by virtue of the enactment of the Senate Bills mentioned. No relationship of debtor and creditor has thereby arisen, and for that reason various appellate court decisions, determining the priority of payment of claims or demands out of a particular appropriation when such claims or demands arise through such a debtor and creditor relationship, are of no value in determining your question. The provision for reimbursing represents merely an act of grace on the part of the State of Missouri, and,

the General Assembly having failed to provide a sum adequate to reimburse all of the counties which necessarily are of an equal rank, we believe that equitable principles should be applied and the deficiency prorated among all of the counties of the state.

The intent of the General Assembly is quite clear in that adequate provision has been made for the reimbursement of the counties affected by the first three bills referred to in your letter. However, the same General Assembly has also seen fit, by the latter enactment, to place counties of the first class on a parity with those of the second, third and fourth classes. This, we think, is persuasive toward the view that inasmuch as the General Assembly has recognized no distinction between the various counties in agreeing to reimburse such counties for a portion of the increased salaries granted the county superintendents of schools, that no such distinction should now be made in applying the sum appropriated for that purpose.

Your attention is directed, however, to the fact that Senate Bill 256, referred to, supra, did not become effective until July 19, 1948. This bill affects only two counties, namely, St. Louis and Jackson. In computing the aliquot part of the appropriation apportioned to these two counties, due regard should be given to the fact that the salary increases provided therein will not be effective for the entire current fiscal year.

CONCLUSION

In the premises, we are of the opinion that the appropriation made under Section 2.093 of House Bill 448 of the 64th General Assembly should be prorated among the various counties of the State of Missouri for the purpose of reimbursing such counties for a portion of the increased salaries granted the various county superintendents of schools, subject, however, to pro rata diminution with respect to counties of the first class for the period of the current fiscal year during which such increased salaries were not in effect.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

COUNTY COURTS: County court does not have power to give a
ROADS AND BRIDGES: bridge on an abandoned county highway to a
special road district in another county, nor
does the county court have power to sell such
bridge to a special road district in another
county for a nominal consideration.

August 19, 1948

Honorable Marvin C. Hopper
Prosecuting Attorney
Linn County
Brookfield, Missouri



Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"I request an opinion from your Department on the following matter:

"A 39 yr. old County bridge, original cost about \$2500., is now located on Mussel Fork Creek in Linn County, Missouri a short distance west of the Linn County-Macon County boundary line. An unimproved one-quarter mile road leads from Highway No. 36 to said bridge, and formerly continued into Macon County, however, about 6-8 years ago the road was blockaded and closed a short distance east of said bridge in Macon County. The above mentioned one-quarter mile road in Linn County is now used exclusively by a tenant farm to gain access to a cornfield.

"The Linn County Court desires to cooperate with the New Cambria Special Road District in Macon County in completing a certain gravel road which will furnish an all weather route eastward from Bucklin, Linn County, Missouri to New Cambria, Macon County, Missouri. The Linn County Court desires to make a gift of said bridge to the Special Road District or to sell same for a nominal consideration, and the Special Road District

Honorable Marvin C. Hopper

will furnish all labor and material necessary to move said bridge to another point on Mussel Fork Creek about one mile north of the present location to a point in Macon County.

"My question is this--Under the above facts, can the Linn County Court make a gift of the bridge to the New Cambria Special Road District? Can the Linn County Court sell said bridge to the New Cambria Special Road District for a nominal consideration?"

Section 2480, R. S. Mo. 1939, provides as follows:

"The said court shall have control and management of the property, real and personal, belonging to the county, and shall have power and authority to purchase, lease or receive by donation any property, real or personal, for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county, appropriating the proceeds of such sale to the use of the same, and to audit and settle all demands against the county."

The Supreme Court of this state, in the case of Butler County v. Campbell, 182 S. W. (2d) 589, 353 Mo. 413, 1. c. 419 said:

" * * * Under the laws of this state, the county court is vested with full power and authority to control and manage the real and personal property of the county and, 'for the use and benefit of the county; to sell and cause to be conveyed any real estate, goods or chattels belonging to the county.' Sec. 2480, R. S. 1939. * * * It is apparent that 'county courts are by law constituted the guardians of the property and interests of their respective counties. 'They occupy a position of trust' in that respect, and 'in that relation are bound to the same measures of good faith toward the counties which is required of an ordinary trustee toward his cestui que trust, or an agent toward his principal.'" State ex rel. Garland County v. Baxter (Ark. Sup.), 8 S. W. 188; Willard v. Comstock (Wis. Sup.), 17 N. W. 401, 406. 'County courts are . . .

Honorable Marvin C. Hopper

the agents of the county, with no powers except what are granted, defined and limited by law, and, like all other agents, they must pursue their authority, and act within the scope of their powers.' State ex rel. Quincy, Mo. & Pac. R. Co. v. Harris, 96 Mo. 29, 37, 8 S. W. 794. The county courts act for the counties in relation to funds held in trust for public school purposes. Secs. 10376, 10378, and 10384, R. S. 1939; Montgomery County v. Auchley, 103 Mo. 492, 502, 15 S. W. 626. The members of the court, as public officers, do not act as individuals with relation to their own property, but as special trustees with limited authority. Saline County v. Thorp, 337 Mo. 1140, 88 S. W. (2d) 183, 186. They are required to act with reasonable skill and diligence, and to discharge their duties with that prudence, caution and attention which careful men usually exercise in the management of their own affairs. * * *

From the quoted portion of the Campbell case, supra, it is clear that the County Court of Linn County does not have the power to give away any county property, or to sell such property for a nominal consideration, unless such authority is specifically given to such court by a statute. We are unable to find any statute in the State of Missouri authorizing the county court of a county to give a bridge to a special road district in another county, or to sell such bridge to the special road district in another county for a nominal consideration. We believe it to be inherent in Section 2480, quoted supra, that the county court is under an obligation to the citizens of the county to receive the highest possible price for any county property that is sold.

Section 8540, R. S. Mo. 1939, provides as follows:

"Whenever the county court of any county, upon investigation, shall be satisfied that the citizens of said county will be benefited by the construction of a bridge in an adjoining county and within one mile of the boundary line dividing said counties, the aforesaid county court may unite with the county court of said adjoining county in causing said bridge to be built and may contribute to the expense of building said bridge in any sum not to exceed one-half the cost of such bridge, and may make an appropriation for the payment of same."

Honorable Marvin C. Hopper

Under authority of Section 8540, if the bridge is within one mile of the boundary line dividing Linn County from Macon County, and the County Court of Macon County wishes to pay for the cost of removing the bridge from Linn County and installing it in the New Cambria Special Road District in Macon County, we believe that the County Court of Linn County would be authorized to give the bridge to Macon County, or to charge Macon County only so much as would make the cost of putting the bridge in Macon County the same amount for both counties. The County Court of Macon County would have the authority to make this agreement under the provisions of Section 8688, R. S. Mo. 1939, if the New Cambria Special Road District is one organized under Article 10, Chapter 46, R. S. Mo. 1939.

CONCLUSION

It is the opinion of this department that the County Court of Linn County does not have the authority to give to the New Cambria Special Road District of Macon County a bridge that is a part of an abandoned road in Linn County, and that the County Court of Linn County has no authority to sell the bridge to the Special Road District for a nominal consideration.

It is further the opinion of this department that if the Special Road District in Macon County is one organized under Article 10, Chapter 46, R. S. Mo. 1939, the County Court of Linn County may give the bridge to Macon County, or charge only so much for the bridge as would equalize the cost of such bridge between the two counties, if the bridge is within one mile of the line separating the two counties.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TAXATION: Method of distribution of County Stock Insurance
REVENUE: Fund.

September 9, 1948

FILED

42

9-13
Honorable Ben H. Howard, Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department, reading as follows:

"I desire to ask for an opinion relative to the distribution of the County Stock Insurance Fund in accordance with the provisions of Section 6093, Page 1025, Laws of Missouri, 1945.

"During the year 1947 the sum of \$140,797.68 was collected and paid into the County Stock Insurance Fund of which amount the sum of \$109,527.74 came from the City of St. Louis and \$31,270.23 from Kansas City, Missouri.

"Section 6093 provides that the Comptroller shall apportion all moneys in the County Stock Insurance Fund to: The General Revenue Fund of the State, to the county treasurer and to the Treasurer of the school district in which the principal office of the company paying same is located.

"Since the rate for state purposes for 1947 taxes was, .07 per Hundred Dollars valuation, being .03 for General Revenue Fund, .03 for Blind Pension Fund and .01 for State Interest Fund, I am writing to ask whether the Blind Pension Fund and the State Interest Fund shall also receive a portion of the above mentioned funds?

"In determining the amount to be apportioned to the City of St. Louis and the St. Louis School District shall the levy for city purposes be used in lieu of the levy for county purposes as set out in the statute,

together with the School tax levy for the City of St. Louis?

"I would also like to know whether the rates for county revenue purposes and City of St. Louis General Revenue purposes only should be used or whether the rate for all county purposes including Road Taxes and all St. Louis City levies should be used in connection with the State levy and the School levies of Kansas City and the City of St. Louis in determining the amount to apportion to each."

Section 6093, R. S. Mo. 1939, as amended Laws of 1945, page 1024, after imposing a tax upon the premiums received by certain insurance companies, further provides in part:

" * * * The state treasurer, upon receiving the moneys paid as a tax upon such premiums to the director of Revenue, shall place said moneys to the credit of a fund to be known as the County Stock Insurance Fund, which is hereby created and established. On or before the first day of September of each year the comptroller shall apportion all moneys in the County Stock Insurance Fund to the General Revenue fund of the State, to the county treasurer and to the Treasurer of the school district in which the principal office of the company paying the same is located. Apportionments shall be made in the same ratio which the rates of levy for the same year for state purposes, for county purposes, and for all school district purposes, bear to each other: * * * * * Whenever the word 'County' occurs herein it shall be construed to include the City of St. Louis."

(Underscoring ours.)

Your first specific question is whether or not the blind pension fund and the state interest fund shall receive a portion of the funds to be distributed.

This question must be answered in the negative, as under the plain wording of the statute quoted, the entire apportionment

made to the state is to be placed in the general revenue fund. However, the total combined state levy--that is to say, seven cents--is to be employed in determining the distribution to be made to the state as the quoted statute further specifically provides that the rates of levy for state purposes are to be so employed.

Your second question is directed to the proper rate of levies to be employed with respect to the City of St. Louis and the St. Louis school district.

With respect to the City, we think your question must be answered in the affirmative, particularly in view of the last sentence of the quoted portion of the statute wherein the word "county" is made directly applicable to the City of St. Louis. Similarly, if the principal office of any of such companies is located within the school district of the City of St. Louis, then the rate of levy of that school district is to be employed in determining the proper apportionment to be made thereto.

Your third question involves determination of what separate levies are to be included in determining the basis for apportionment to the City of St. Louis and to the school districts of Kansas City and the City of St. Louis.

It is noted that apportionment is to be based upon the rates of levy for county purposes and for all school district purposes. Therefore, in determining the rate of levy to be employed with respect to the City of St. Louis, the total of all city levies, excluding those of special benefit nature, are to be employed. The same is true with respect to the school districts of the City of St. Louis and Kansas City as the phraseology of the statute is the same with respect to such political subdivisions. It seems to be the purpose of the statute to distribute the proceeds of such tax in the same proportion as though property were located within the school district in which the principal office of the company paying such tax is located. This procedure will produce a uniformity of taxation which we deem to be in accord with the intent of the General Assembly.

CONCLUSION

In the premises, we are of the opinion

1. That in determining the amount of the County Stock Insurance Fund to be apportioned to the general revenue fund

Hon. Ben H. Howard

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of the state, the Comptroller should employ the combined total rates of levies for all state purposes;

2. That in determining the amount of the County Stock Insurance Fund to be apportioned to the City of St. Louis, the Comptroller should employ the combined total of the rates of levies made by such city for all city purposes, excluding rates of levies for special assessments, if any;

3. That in determining the amount to be apportioned to the St. Louis school district, the Comptroller should employ the combined total of the rates of levies imposed by said school district for all school district purposes.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J.E.*

WFB:VLM

COUNTY MEMORIALS: State's contribution to county memorial to Monroe County approved; to Knox County disapproved.

November 16, 1948

FILED

42

11-17
Honorable B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and enclosing certified copies of orders of the county courts of Monroe County and Knox County, upon which such counties base a request for the allowance to such counties of \$1,000.00 by the state as provided in Section 15446, R. S. Mo. 1939.

We find that the certified copy of the order of the county court of Knox County, dated December 22, 1947, provides that a contract for the establishment of a Knox County Memorial Fair has been entered into by the Knox County Fair Association and Post No. 4822 of the Veterans of Foreign Wars of Edina. Under the contract, the Knox County Fair Association agreed and turned over to the Knox County Veterans of Foreign Wars Post \$1,000.00 to be used for the purpose of forming the Knox County Memorial Fair and complying with Section 15446, R. S. Mo. 1939. One thousand dollars in United States Government Bonds has been placed in the custody of John Woodward, the county clerk, to be held in escrow for the purpose of establishing, constructing and operating a Knox County Memorial Fairgrounds under the sponsorship of the Veterans of Foreign Wars chapter. The order further provides that the county court ordered that a Knox County Memorial Fair Association be formed, and that the fairgrounds be lettered in memory and appreciation of the services of First World War soldiers. While it is not perfectly clear just what is contemplated by the order of the Knox County Court, it apparently is an attempt by the county court to contribute \$1,000.00 of county funds to a Knox County Memorial Fair, which is to be operated by the local Veterans of Foreign Wars Post and based on such order a request is made that the state match such allotment.

We are of the view that Sections 15444, 15445 and 15446, R. S. Mo. 1939, do not permit the contribution by a county to a memorial fairgrounds, and further direct that the construction of the memorial be under the supervision and direction of the county court. Section 15444 provides in part as follows:

" * * * a memorial building, monument or other suitable testimonial shall be erected or placed in each of the counties of the state and in cities not part of a county. Such memorial may be a building or a monument or in the form of tablets suitably inscribed and placed in some building at the county seat of such counties or at such places designated by the county courts of said county and in said cities not part of a county. The exact nature of such memorial shall be determined by the county court of the county or by the municipal assembly of said city."

We are of the opinion that the above quoted provision limits the type of memorial which may be constructed under the provisions of these sections, and that a memorial fairgrounds is not one of the purposes permitted by the act. We believe, also, the fact that apparently the entire control and management of the fairgrounds by the local Veterans of Foreign Wars Post violates the provisions of Section 15445.

Therefore, it is our opinion that since said sections have not been complied with, the application of Knox County should be disapproved.

The certified copy of the order of Monroe County dated December 8, 1947, states that upon application by Veterans of World War II, the County Court of Monroe County, Missouri, appropriated \$1,000.00 for carrying out the provisions of Laws of 1919, pages 78, 79 and 80, which are now Sections 15444, 15445 and 15446. The order further provided that such moneys should be used in the erection of a building, monument or other suitable testimonial to be erected or placed in Monroe County, Missouri. It further provided that the appropriation was on condition that the State of Missouri allot a like amount.

While the specific location of the memorial is not set out in the order, except insofar as it states that it will be located in Monroe County, we believe that such order is sufficient. It appears that the county court will follow the provisions of the law and construct the type of memorial authorized by the statutes and that such county court will

Hon. B. H. Howard

-3-

erect the memorial and carry out the provisions of Article 11, Chapter 138, R. S. Mo. 1939.

Therefore, we are of the opinion that the request of Monroe County should be approved.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J. E.*

CBB:VLM

CRIMINAL LAW: Issuance of certified copy of judgment and sentence or "commitment" a mere ministerial act and errors therein may be corrected.

November 29, 1948

FILED

42

Honorable Marvin C. Hopper
Prosecuting Attorney
Linn County
Brookfield, Missouri

12-2

Dear Sir:

Reference is made to your request of recent date for an official opinion of this office reading as follows:

"Richard Roe' was sentenced to the Missouri State Penitentiary from Linn County on the 11th day of June, 1947 for a term of six years for the crime of larceny of an automobile.

"In preparing the commitment papers, the Clerk of the Circuit Court or her Deputy made a mistake in designating the term as two years.

"About ten days ago 'Roe' received a discharge after having served 16 months of the six year term.

"Under these facts what, if anything, can be done to require 'Roe' to serve the balance of his term, and what procedure should be invoked."

It is assumed in this opinion that the judge's minute book and the judgment roll of the Circuit Court of Linn County correctly reflect a judgment entered in accordance with the verdict of the jury and the imposition of a sentence upon the person mentioned in your inquiry of a term of six years to be served in the state penitentiary. We have substituted the name "Richard Roe" for the true name of the person mentioned in your letter of inquiry.

Section 4106, R. S. Mo. 1939, provides as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

In construing this section and its effect upon the sentence to be served, the Supreme Court of Missouri, en banc, in Williford vs. Stewart, 198 S.W. (2d) 12, 1.c. 14, said:

"With the case standing as it does the question is, shall the judgment shown in the commitment prevail over the judgment and minutes certified to us directly by the circuit clerk. We think the answer clearly is that we must accept the latter as authentic. As a matter of fact, the only commitment required by the statute is a certified copy of the judgment and sentence. Sec. 4106 provides that when any convict shall be sentenced to the penitentiary in a trial court, the clerk shall forthwith deliver to the sheriff of the county a certified copy of the sentence, which must, of course, show the date of its pronouncement, the identity of the convict, the crime of which he was convicted and the punishment imposed. And Sec. 9057 provides that when the convict is delivered to the Commission of the Department of Penal Institutions, the officer having him in charge shall deliver to the Commission the certified copy of the sentence previously received by such officer from the clerk of the court. This, of itself, is enough to show the judgment and sentence are controlling. A commitment is in the nature of a warrant, and its issuance by the clerk is a ministerial act. The authorities generally are to the above effect. 15 Am. Jur., p. 152, Sec. 502;

24 C.J.S., Criminal Law, Sec. 1608, p. 161; 7 Words & Phrases, Perm. Ed., 'Commitment,' p. 832; Reardon v. Frace, 344 Mo. 448, 451, 452, 126 S.W. 2d 1167, 1168; Ex parte Simpson (Mo. Sup. banc) 300 S.W. 491, 493 (2)."

(Underscoring ours.)

In Ex parte Simpson, 300 S.W. 491, 1.c. 493, referred to supra, the same court said:

" * * * The judgment entered on January 9, 1926, appropriately evidenced the right of the warden to imprison petitioner and authoritatively fixed the commencement and termination of his term of imprisonment, whether or not the warden ever heard of that judgment until this proceeding was instituted. * * * * *"

These cases clearly indicate that the imprisonment in all institutions is properly referable to the valid judgment and sentence found upon the record of the court without regard to errors which might occur in copying such record in the preparation of a commitment. This view is further borne out by the provisions of Section 4104, R. S. Mo. 1939, which reads as follows:

"Whenever a judgment upon a conviction shall be rendered in any court, the clerk of such court shall enter such judgment fully on the minutes, stating briefly the offense for which such conviction shall have been had, and the court shall inspect such entries and conform them to the facts; but the omission of this duty, either by the clerk or judge, shall in nowise affect or impair the validity of the judgment."

Comes then the question of the proper procedure to be followed in returning the person named in your letter of inquiry to the penitentiary. We do not find any cases precisely ruling this question, but we do believe that the principles set out in Williford vs. Stewart and Ex parte Simpson, cited

supra, indicate that it would be proper for the circuit clerk to issue a new certified copy of the judgment and sentence under the provisions of Section 4106, R. S. Mo. 1939. Such commitment could thereupon be delivered to the sheriff, who would be empowered to return the person named therein to the state penitentiary.

In Ex parte Simpson, an improper commitment had been issued by the clerk of the circuit court. The court held therein that such misprision on the part of the clerk could not effect the right of the warden of the penitentiary to retain custody of the defendant as long as there was found upon the record of the circuit court a valid judgment and sentence. To this effect, the court said, l.c. 493:

" * * * It is unimportant and entirely beside the question that the certified copy of the vacated judgment of January 8, 1926, in the burglary case, under which the warden naturally assumed that he was holding petitioner, did not specify that the term of imprisonment was to commence at the expiration of petitioner's imprisonment in the grand larceny case. The recitals of the judgment entered on January 2, 1926, and not those in the vacated judgment of the previous day, are controlling here."

(Underscoring ours.)

CONCLUSION

In the premises, we are of the opinion that the Circuit Clerk of Linn County, Missouri, may properly issue a certified copy of the judgment and sentence imposed upon the person mentioned in your letter of inquiry based upon the original record of the Circuit Court for said county.

We are further of the opinion that such certified copy of the judgment and sentence will be sufficient authority for the sheriff of said county to take such person into custody and deliver him to the warden of the Missouri State Penitentiary, there to finish serving the balance of the sentence originally imposed upon him.

APPROVED:

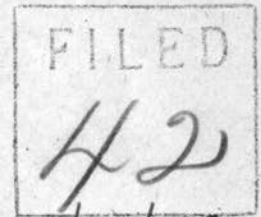
Respectfully submitted,

J. E. TAYLOR
Attorney General

TB

WILL F. BERRY, JR.
Assistant Attorney General

APPROPRIATIONS: Attorney fee paid in connection with issuance of revenue bonds not "matching funds" within the meaning of an act found Laws of 1945, page 397, and an act found Laws of 1947, Vol. I, page 175, December 9, 1948



12/10/48

Mr. B. H. Howard
Comptroller
Department of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"The Northeast Missouri State Teachers College has requested that attorney fees paid in connection with issuance of dormitory revenue bonds be considered as a cost of construction of the building, so that the fees may be included in the total to be matched by the State of Missouri.

"Before answering the request we would appreciate an opinion from your office as to the validity of considering such fees as a cost of the building.

"We are enclosing a letter from Mr. Roland A. Zeigel, Secretary of the Board of Regents, which outlines their reasons for making the request."

The question presented arises by virtue of the enactment of an act found Laws of Missouri, 1945, page 397, and Section 9.230 of an act found Laws of Missouri, 1947, Vol. I, page 175. These are appropriation bills setting aside state funds to be used in assisting various educational institutions of the State of Missouri in the construction and equipping of dormitories, recreational and social buildings, etc. Section 3 of the first act mentioned reads as follows:

"No funds provided under provisions of Section 1 of this Act shall be expended unless equally matched by funds provided for by the issuance of revenue bonds by

the respective institutions or funds, other than State appropriated moneys, supplied by the respective institutions or from federal grants made to them for such purposes."

A portion of the second act mentioned reads as follows:

"Provided, however, that any funds appropriated under this section shall be expended under the supervision of the administrative boards of the institutions to which the money is appropriated, and such funds shall not be expended unless equally matched by funds provided for by the issuance of revenue bonds by the respective institutions or funds, other than state appropriated moneys, supplied by the respective institutions or from federal grants made to them for such purposes; and provided further, that the cost of any dormitory now under construction or which may be purchased or reconstructed which shall provide a part of the program under the provisions of this section shall be considered as matching funds as required in this section; * * * * *"

(Underscoring ours.)

Section 655, R. S. Mo. 1939, providing rules for the construction of statutes of this state, provides in part as follows:

"The construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the legislature, or of the context of the same statute: First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * * *

We believe that the phraseology contained in the appropriation bills, when construed in accordance with this rule,

clearly indicates that it was the intent of the legislature to authorize the disbursements of the moneys provided therein only upon the various institutions actually and in fact expending funds from the other enumerated sources in an equal amount for the purposes of the appropriation. In other words, we do not believe that such moneys may be disbursed in erecting new buildings unless a similar amount of money is so provided by such institutions. The fact that the expense incurred in obtaining the opinion of counsel indirectly was instrumental in procuring funds for such usage does not affect the matter. It is our thought that only such proceeds arising from the sale of the bonds as was or may be directly spent for the purpose of the construction program may be treated as "matching funds" within the meaning of the appropriation bills. To hold otherwise would authorize the disbursement of such moneys upon payments made by the various institutions for all of its operating expenses, inasmuch as all of such expenses indirectly, and to some extent, do assist in providing funds from which the schools may make payments toward the cost of such buildings.

CONCLUSION

In the premises, we are of the opinion that money expended by an educational institution for counsel fees for an opinion respecting the validity of revenue bonds may not be treated as "matching funds" nor part of the "cost of building" within the meaning of an act found Laws of Missouri, 1945, page 397, and a further act found Laws of Missouri, 1947, Vol. I, page 175.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JTB*

WFB:VLM

CRIMINAL LAW:
AND COSTS:

Costs for issuing search warrants to agents
of the Conservation Commission.

FILED

42

December 21, 1948

12-22

Honorable A. B. Hoy
Magistrate, Saline County
Marshall, Missouri

Dear Judge Hoy:

This will acknowledge receipt of your request for an opinion
which reads:

"I am writing you for an opinion with reference
to payment of costs of Search Warrants.

"My problem is that where Search Warrants are
issued to a Conservation Agent under Section 5,
page 666 of the Session Acts of 1945, 'providing
that an agent of the Commission may cause
proceedings to be commenced against any person
for the violation of the Conservation Act or
any such rules and regulations and such officer
shall not be obligated to furnish security for
costs.' Under this section our resident agent
of the Commission made affidavit for search
warrants to search the premises of five different
persons. Said warrants were returned with no
results and no action was brought against any
of these people.

"Will the magistrate office be charged up with
the usual \$2.50 Magistrate Fee under this
situation, and if so, how will they be and
by whom paid?"

It is well established that at common law costs were unknown
and therefore one's right to costs depends entirely upon the
statutes. Furthermore, such statutes must be strictly construed.
See In re: Thompson, 150 S.W.(2d) 626, State v. Ball, 158 S.W.(2d)
182; McCrary v. Michael, 109 S.W.(2d) 50, 233 Mo. App. 797.

We have searched the statutes to find such authority for taxing
costs in this instance and find statutes covering most all kinds of
cases involving costs such as proceedings to recover fine, penalty
or forfeiture, trial on an indictment or information, when a person

has been committed or recognized to answer for a felony or the defendant has been discharged or acquitted, or upon conviction of a misdemeanor, or the crime committed constitutes a capital offense. However, this case does not come within any of the foregoing statutes relating to costs.

It does provide under Section 5, page 666, Laws Missouri, 1945, that any authorized agent of the Conservation Commission may cause proceedings to be commenced against any person violating said act, or any rules and regulations, promulgated by said Conservation Commission and such officers are not obligated to furnish security for costs. Said provision further authorizes such agents in certain instances to search without the necessity of securing a search warrant but further requires said agents to secure a search warrant to search certain premises and that said warrant shall be issued by any magistrate having jurisdiction, upon said complaint being made under oath in writing that he has reasonable and probable cause to believe that wild life is being concealed contrary to said act or rules and regulations of the Commission. There is no provision in said act fixing liability for such costs.

In view of the foregoing announced principle relative to taxing costs, there definitely must be a specific statute authorizing the taxing of such costs before anyone may be required to pay same and in this case there is no such statute. For the purpose of this opinion we are assuming that no information had been filed prior to the issuance of the search warrant.

CONCLUSION

Therefore, in the absence of any specific statutory authorization to tax said costs we must conclude that such costs cannot be taxed in this instance.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARB:mw
TB

WITNESSES: Wife is competent witness against husband for failure to support wife and minor child. Same when wife is divorced.

December 27, 1948



Honorable Marvin C. Hopper
Prosecuting Attorney
Linn County
Brookfield, Missouri

12-28

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"Will you please furnish me an opinion on the following matters:

"(1) When a father is prosecuted for failure to support his wife and minor children, is the wife a competent witness against said father and husband?

"(2) When a father is prosecuted for failure to support his minor children, the father and mother of said children then being married, is the wife and mother a competent witness against said father and husband?

"(3) When the spouses are divorced, is the former wife a competent witness against the former husband in a prosecution for failure to support the minor children born of the marriage?"

In the case of State vs. Hartman, 259 S.W. 513, a trial for abandonment and non-support of children, the Springfield Court of Appeals said, l.c. 514:

"On another trial the former wife should not be permitted to testify concerning matters that transpired during coverture (State v. Kodat, 158 Mo. 125, 59 S.W. 73, 51 L.R.A. 509, 81 Am. St. Rep. 292; State v. Williams, 202 Mo. App. 536, 208 S.W. 283) unless defendant himself opened the

door for the admission of her testimony, as he did in this trial.

"Our attention is called to the case of State v. Langley, 248 Mo. 545, 154 S.W. 713, where the opinion of the Supreme Court discloses that the wife testified and makes no criticism. We do not find that any objection was made in that case or that the point was raised in the case."

In the case of State vs. Newberry, 43 Mo. 429, a prosecution for abandonment of a wife, the Supreme Court said, l.c. 432:

" * * * The wife is the party having the best means of knowledge, and may be the only person capable of establishing the facts in proof."

The Court further said at l.c. 433:

"The conclusion, therefore, upon the whole case, is that Mrs. Newberry, the complainant, was a competent witness to testify to the fact of abandonment and its attendant circumstances. * * * "

In the case of Ex parte Dickinson, 132 S.W. (2d) 243, the Springfield Court of Appeals said, l.c. 245:

" * * * The common law rule has been modified to the extent that the wife may testify against the husband in divorce proceedings and in a prosecution of him for wife and child abandonment, * * * "

We believe that the reasoning in the Newberry case, supra, leads to the inevitable conclusion that a wife may testify as to non-support because that in most cases, she is the only person who is capable of establishing the facts just as truly as she is the only person establishing the facts in a case of abandonment. We believe, also, that under the statement of the Springfield Court of Appeals in the Dickinson case, supra, that a wife may testify for wife and child abandonment that

the non-support of the child is similar to abandonment of the child and that of necessity, the wife is a competent witness in a prosecution for non-support of a child. While it is not clear as to just what facts were testified to in the Hartman case, we do not believe that such holding quoted above means that the wife is an incompetent witness to testify against a husband in a prosecution for non-support of children. We believe that the law, as it exists at present, is well stated by the Criminal Court of Appeals of Oklahoma in the case of Hunter vs. State, 134 Pac. 1134, where the court said, 1.c. 1138:

"We do not believe this court will say that we have so foolish a public policy in Oklahoma that closes the lips of an abandoned and deserted wife, in order that the family harmony and concord which has been utterly destroyed by the husband's acts shall not be further disturbed. The right of the public, upon whom this father would cast his own offspring for support, demands that this woman should be heard; the right of the children whom he would willingly leave in want and neglect demands that she be heard; and her rights, grievously disregarded by him, demand that she be permitted to bear witness against him for his breach of his marital obligations. Surely, any public policy which would deny her the witness stand would be one wholly without reason, wholly contrary to the essential welfare of families, and therefore wholly wrong."

When the husband and wife are divorced, the relationship ceases to exist, and in such cases, the wife is a competent witness to testify as to any fact that may have occurred after the divorce.

CONCLUSION

It is the opinion of this department

(1) that the wife may testify against her husband for failure to support her and her minor children;

Hon. Marvin C. Hopper

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(2) that the wife is a competent witness to testify in the prosecution of her husband for failure to support the children;

(3) that when the husband and wife are divorced, the wife is a competent witness to testify against the former husband in a prosecution for failure to support the minor children born to the marriage.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J. E. Taylor*

CBB:VLM

TAXATION: Dirt moving and hauling machinery used by foreign corporation contractor in work on railroad in Iron County, if present on January 1st, is taxable in Iron County.

FILED

43

June 18, 1948

6-21

Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"The County Court has asked me to write your office for an opinion on whether or not the rolling stock belonging to a foreign corporation which is used on a job in Iron County and has been within the County for more than a year is taxable in Iron County.

"The Mo-Pac. R.R. has been having its grade cut down within this County, particularly at a place we call Tip-top. The job has been let to a private contractor, who has, in turn, sub-contracted parts of the job. They have been at the work now for more than one year. Much heavy dirt moving and hauling machinery has been in Iron County all that time employed in the various jobs. This machinery is all what might be called rolling stock since it can be moved on its own wheels.

"Is such property taxable here as personal property?"

Section 9, Laws of Missouri, 1945, page 1799, reads as follows:

"All tangible personal property of business and manufacturing corporations shall be taxable in the county in which such property may

be situated on the first day of January of the year for which such taxes may be assessed, and every business or manufacturing corporation having or owning tangible personal property on the first day of January in each year, which shall, on said date, be situated in any other county than the one in which said corporation is located, shall make return thereof to the assessor of such county or township where situated, in the same manner as other tangible personal property is required by law to be returned."

Section 27, Laws of Missouri, 1945, page 1782, reads as follows:

"The real and tangible personal property of all corporations operating in any county in the State of Missouri and in the City of St. Louis, and subject to assessment by county or township assessors, shall be assessed and taxed where situated."

Under the clear and direct wording of the above-quoted statutes, the personal property of the contractor described in your letter which was in Iron County on January 1, 1948, may be assessed and taxed in Iron County as personal property.

CONCLUSION

It is the opinion of this department that where a foreign corporation has contracted for work on a railroad and has machinery in a county on January 1st of any year, such property is taxable in such county as personal property.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JTB*
Attorney General

CBB:HR

P.T.
August
TAXATION: County court may not control the county assessor
ASSESSORS: in determining the assessment lists of personal
COUNTY COURTS: property which he will make.

June 22, 1948

FILED

43

6-26

Honorable W. R. J. Hughes
Prosecuting Attorney
Iron County
Ironton, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you submit a request for an official opinion in the following language:

"It has been the habit of the Assessor to assess everyone in Iron County regardless of amount of property owned, arbitrarily listing most of our indigent poor as owning property of much less than \$50 in value, in some cases as little as \$10, and to charge the County for each such list. At \$.45 each list, for half of which Iron County is responsible, the County therefore finds itself paying out for the list alone much more than the amount of tax realizable. Most of these tax assessments are absolutely uncollectable, and the County finds itself throwing away money.

"The Court would like your opinion on whether they can insist that the assessor prepare no list where the one assessed owns less than, let us say, \$100 worth of taxable property. In other words, can the Court refuse to pay for such lists as show on their faces that the amount realizable in taxes cannot equal the assessor's fee?"

The substance of your request is the question of the authority of the county court to control the assessor in the performance of his duties, and especially in cases where the tax on the value of the personal property, which the assessor includes in the list, is less than the amount of costs for which the state and county would be liable for the assessment.

Since Iron County is a county of the fourth class, we will refer to general statutes relative to assessors and to statutes applicable to counties of the fourth class, relative to the same officer. Under Section 8, page 1801, Laws of Missouri, 1945, it is provided as follows:

"All tangible personal property of whatever nature and character situate in a county other than the one in which the owner resides shall be assessed in the county where the owner resides, except tangible personal property belonging to estates, which shall be assessed in the county in which the probate court has jurisdiction."

Under this section, it will be seen that there is no minimum or maximum amount fixed which would excuse any person who owns tangible personal property from his liability for taxes. Under Section 4, page 1800, it is provided that every person owning or holding real or tangible personal property on the first day of January is liable for taxes thereon during the same calendar year. Referring to Section 10, Laws of Missouri, 1945, page 1785, which relates to the duties of the assessor in making assessments, we find that it provides in part as follows:

" * * * After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: * * * * "

By this provision, it will be seen that it is the duty of the assessor to list all personal property in his county. Under Section 11 of the act, related to taxation and revenue, found at page 1786, Laws of Missouri, 1945, the procedure in case of absence of the taxpayer and failure to make the list, is set out as follows:

"If any person required by this chapter to list property shall be sick or absent when the assessor calls for a list of his property, the assessor shall leave at the

office, or the usual place of residence or business of such person, a printed assessment blank and a printed notice, requiring such person to make out and mail or take to the office of said assessor, not more than twenty days from the date of such notice, a sworn statement of the property which he is required to list. If any such person shall have died prior to the time when the assessor calls for such list, the assessor shall deliver such assessment blank and printed notice to the executor or administrator of such deceased person, and such executor or administrator shall make out and deliver to the assessor such sworn statement of all the property of such decedent. The date of leaving such notice and the name of the person required to list the property shall be carefully noted by the assessor; and if any such person shall neglect or refuse to deliver the statement, properly made out, signed and sworn to as required, the assessor shall make the assessment, as required by this chapter."

This section sets out the procedure that the assessor should follow in order to make a valid assessment in cases in which he cannot make a personal call on the taxpayer. In addition to Section 11, supra, Section 14, page 1787, Laws of Missouri, 1945, makes the further provision in case no list is given. It provides as follows:

"Whenever there shall be any taxable property in any county, and from any cause no list thereof shall be given to the assessor in proper time and manner, the assessor shall himself make out the list, on his own view, or on the best information he can obtain; and for that purpose he shall have lawful right to enter into any lands and make any examination and search which may be necessary, and may examine any person upon oath touching the same."

This section is especially applicable when the assessor finds property in his county upon which no assessment has been made. In construing taxing statutes relating to the duties of the assessor, with respect to making a valid assessment, the court, in the case of *Cape Girardeau vs. Buehrmann*, 148 Mo. 198, 1.c. 206, said:

"The assessor left no copy of his assessment with any member of defendant's family. This is a substantial right secured to the citizen and we have no disposition or right to construe it out of the statutes. To neglect it is to ignore the right of a taxpayer to seek to redress if the assessment is unjust."

Section 18 of the act, referring to taxation of revenue, page 1788, Laws of Missouri, 1945, provides as follows:

"Whenever an assessment of property is made in the absence of the owner thereof, a duplicate list of such assessment shall be left, at the time of assessment, with some other member of the family not less than fifteen years of age, or with whoever may be in charge of such property. If the owner of the property is a non-resident, and neither he nor his agent is present when the assessment is made, a duplicate of the assessment shall be mailed by the assessor to the owner at his last address, if known."

Under this section, it will be seen that the procedure for the assessor to follow, in case of absence of the taxpayer when the assessment is made, is set out. In discussing this procedure, the court, in the case of State ex rel. Wenneker vs. Cummings, 151 Mo. 49, 1.c. 58, said:

" * * * The assessor is required to call in person at the office, place of doing business or residence of each person subject to taxation, and require such person to make a correct statement of all taxable property owned by such person, or under the care, management, or charge of such person. If the owner is not at home, the statute requires that a written or printed notice be left at the place of business or residence of the taxpayer, notifying such person to make a list, and the assessor is required to specifically note the date of the service of such notice. By this personal call or written or printed notice, the taxpayer is secured the privilege of

stating exactly what property he has and its value. When this call is made on the taxpayer, and request made on him for his list, or, if he be absent, the notice is left for him, within the period from June 1st to January 1st succeeding, then jurisdiction is obtained to assess his property. * * * "

So, it will be seen, by a statement of the court in the two cases cited above, that before the assessor can acquire jurisdiction to make an assessment, he must have followed the provisions of the statute in making the assessment personally on the taxpayer or by leaving a duplicate list of such assessment with some member of the family, not less than 15 years of age, or with whoever may be in charge of the property. We have referred to these sections for the procedure for making a valid assessment because this might enter into the question of whether assessments lists should be paid for by the county and state.

The compensation of assessors of counties of the fourth class is provided for in Section 1, page 1553, Laws of Missouri, 1945. This section provides as follows:

"The compensation of the county assessor in counties of the fourth class having a population of 7500 or more shall be 45 cents per list, and in counties having a population of less than 7500 shall be 45 cents for each personal assessment list and resident land list and 20 cents for each non-resident real estate assessment list, and in all the counties of the fourth class, each county assessor shall be allowed a fee of 6 cents per entry for making real estate and tangible personal assessment books, all the real estate and tangible personal property assessed to one person to be counted as one name, one-half of which shall be paid out of the county treasury and the other one-half out of the state treasury. The assessor in counties of the fourth class shall place the street address or rural route and post office address opposite the name of each taxpayer on the tangible personal property assessment book; provided that nothing contained in this section shall be so construed as to allow any pay per name for

the names set opposite each tract of land assessed in the numerical list."

The laws applicable to compensation of county assessors were reenacted in Laws of Missouri, 1945, in order to comply with provisions of the Constitution, that is, as to classification of counties. However, the provisions relating to the procedure of assessors in such counties was not changed. Therefore, we will look to the construction placed on some of these acts by the court prior to the 1945 reenactions. In the case of State ex rel. vs. Gomer et al., 101 S.W. (2d) 57, the court, after reviewing the various statutes which we have referred to hereinbefore, announced the following conclusions, i.e. 66:

"First. That an assessor should obtain a list in the form prescribed by section 9756, R. S. 1929 (Mo. St. Ann. Section 9756, p. 7872), from every person who owns 'taxable personal property in his county,' and should require such list to contain 'a list of all the real estate and its value' owned by such persons.

"Second. That whenever from any cause a list of any taxable personal property is not delivered to him by the owner or his representative, then the assessor shall make a list thereof as required by section 9760, R. S. 1929 (Mo. St. Ann. Section 9760, p. 7877), or if the owner of such property is deceased then as required by section 9763, R. S. 1929 (Mo. St. Ann. Section 9763, p. 7879).

* * * * *

"Fifth. That an assessor is required to make 'Part Second' of his book denominated 'Personal Property,' from the lists taken by him from property owners, or made out by him whenever, for any cause, it has not been possible to obtain from the owner a list of any taxable personal property which he has been able to locate.

* * * * *

"Seventh. That as for compensation for taking the lists required to be delivered

to him by owners of personal property (in counties of not more than 40,000 population) an assessor should be paid 35 cents for each list taken and should also be paid a fee of 3 cents per entry for each entry, of a property owner's name and the personal property assessed to him, in the alphabetical list in the part of his book covering personal property.

* * * * *

"Ninth. That the county and the state shall each pay one-half of the compensation for taking lists, and for making proper entries in both the land list and the personal property list."

It will be seen by the ruling of the court in this case that it is the duty of the assessor to list all personal property of taxpayers residing in his county, and there is no limitation, maximum or minimum, which would excuse him from listing all property and property owners. Under the general rulings, public officials may not exercise any duties outside of the scope of the statutes creating their offices. We find no statute or constitutional provision which would authorize the county court to regulate or control the county assessor in making his assessments. The court may equalize values when it is sitting as a board of equalization, but it does not have authority to determine what assessments the assessor will make.

CONCLUSION

Therefore, the opinion of this department is that the court may not control or regulate the county assessor in determining what assessments of personal property he will make; that under the law it is his duty to assess all property in the county, and if he makes valid assessments, then he should be compensated therefor as is provided by Section 1, page 1553, Laws of Missouri, 1945.

Respectfully submitted,

APPROVED:

TYNE W. BURTON
Assistant Attorney General

J. E. TAYLOR
Attorney General

TWB:VLM

LABOR: Division of Industrial Inspection does not have authority to make or promulgate rules and regulations.

FILED

44

March 15, 1948

3/19

Mr. Lon W. Irwin, Director
Division of Industrial Inspection
Jefferson City, Missouri

Dear Mr. Irwin:

This is in reply to your request of recent date for an opinion as to the authority of the Director of the Division of Industrial Inspection to make and promulgate certain rules and regulations governing employment agencies licensed by the Division of Industrial Inspection and, if the authority exists, whether or not these rules are reasonable.

The rules which are set out below were filed in the office of the Secretary of State under date of November 28, 1947, to be effective ten days later:

1. The free employment offices and services afforded by the Division of Employment Security of the State of Missouri are recognized as the largest and best employment offices and services in the State. No employment office, service or agency licensed by the Division of Industrial Inspection of the State of Missouri shall advertise or represent, directly or inferentially, that it is the "largest" or "best" employment office, service or agency in the State, nor shall it by any means whatsoever misrepresent the scope or efficiency of its service or business.

2. Any employment agency licensed by the Division of Industrial Inspection which accepts a fee for securing employment for an applicant shall, upon the request of said applicant refund such fee in cash,

when said applicant has not accepted the employment to which he was referred by said agency.

3. The term "acceptance of employment" when used by any employment agency licensed by the Division of Industrial Inspection shall mean (1) referral of an applicant by said agency to an employer who has a bona fide job order with said agency, (2) and the employment of said applicant by said employer and the placing of said applicant's name on said employer's payroll and the payment of wages to said applicant for services rendered.

4. No employment agency licensed by the Division of Industrial Inspection shall in any manner whatever, verbally or in writing, threaten any applicant with a lawsuit or court costs because said applicant has not accepted any employment to which he was referred by said agency.

5. The term "applicant" as used in these rules shall mean any person who applies to a licensed employment agency for referral to work, a job or a position.

6. Any employment agency may have its license revoked at any time by the Director of the Division of Industrial Inspection when, after a fair hearing, he determines that it has violated any of these rules.

Because of the view this office takes of the authority of the Director to promulgate these rules and regulations, it will be unnecessary in this opinion to inquire into the reasonableness.

The authority to make the rules was purportedly contained in Section 6 of Senate Bill No. 246, found in Laws of Missouri, 1945, at page 1103. This section reads, in part, as follows:

"To approve or disapprove all rules or regulations promulgated by any division within the Department. Such rules or

regulations shall not become effective until ten days after their approval by the Commission and copies thereof have been filed in the office of the Secretary of State."

This section does not grant authority to make rules and regulations, but gives the Commission power to approve rules and regulations made by the various divisions in the department. Other subsections of Section 6 which pertain to rule-making powers are limited to the internal management of the Department of Labor and Industrial Relations. Thus it is seen that if the power to make rules and regulations exists in the Director of the Division of Industrial Inspection it must be found in some other legislative enactment.

Legislative enactments providing for the regulations of employment agencies are to be found in Article 2, Chapter 68, Revised Statutes of Missouri, 1939, Sections 10161 to 10165. At the outset, it is to be noted that the licensing officer and the officer upon whom the duty rests to enforce these regulations was the State Commissioner of Labor and Industrial Inspection. Section 10140, Laws of Missouri, 1945, page 1098, provides:

"The Division of Industrial Inspection of the Department of Labor and Industrial Relations shall have all powers and rights heretofore conferred upon the Department of Labor and Industrial Inspection, and the director of said division shall be chargeable with the duty of enforcing all the provisions of Chapter 68 of the Revised Statutes of Missouri, 1939, and all acts amendatory thereof and shall be liable to all the penalties to which the Commissioner of Labor and Industrial Inspection was amenable at the time this act becomes effective."

Thus it is seen that the Director of the Division of Industrial Inspection has succeeded to the powers, duties and liabilities of the State Commissioner of Labor and Industrial Inspection and his authority to make rules and regulations governing employment agencies must stem from the fact that said authority had been conferred upon the Commissioner of Labor and Industrial Inspection.

The principal section having to do with the regulation of employment agencies is 10161, Revised Statutes, 1939, originally enacted in 1909 and substantially the same today as when first enacted. It provides, in substance, that employment offices must obtain a license; give a bond; keep a register; not indulge in false or fraudulent advertisement; give any false information or make any false promises concerning or relating to work or employment; and other miscellaneous provisions for regulation of these agencies. It is to be noted that nowhere in this section, nor any of the other sections pertaining to regulation of employment agencies, is there found language delegating to the Commissioner, or any other board or officer, the authority to make reasonable rules and regulations for the carrying out of the provisions of the act.

Inasmuch as this authority has not been expressly conferred on the Commissioner, we must look to see if the power to make these rules and regulations may be implied. It is a familiar rule of law that in addition to the powers expressly given by statute to a public officer he has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted or as may be fairly implied from the statute granting the express powers. (State on inf. McKittrick vs. Wymore, 132 S.W. (2d) 979, 345 Mo. 169.)

Certain analogous factual situations such as is met by the Division of Industrial Inspection in carrying out its duties under the act regulating employment agencies are dealt with by health authorities in performing their duties. In 39 Corpus Juris Secundum the authority granted to health authorities is discussed on page 822 as follows:

"Health authorities, such as boards of health, have such powers, and only such powers, as are conferred on them, either expressly or by necessary implication. A power expressly conferred on them includes the necessary authority effectually to perform the duties delegated to them.
* * *

Again, at page 823:

"Boards of health or other sanitary authorities have no inherent legislative power; they cannot, by their rules and regulations,

enlarge or vary the powers conferred on them by the law creating them and defining their powers, and any rule or regulation which is inconsistent with such law, or which is antagonistic to the general law of the state, is invalid. * * *

Under the section on Constitutional Law in 16 Corpus Juris Secundum the following language is found at pages 510, 511 and 512:

" * * * the power to alter or repeal laws is, as shown supra Sec. 106, a legislative power, and executive officers may not, by means of construction, rules and regulations, orders, or otherwise, extend, alter, repeal, or, ordinarily, set at naught or disregard, laws enacted by the legislature.

"However, the power to make rules and regulations to carry out the provisions or expressed purpose of a statute is not an exclusively legislative power, but is administrative in nature, and may be exercised by executive officers. The power conferred to make regulations for carrying a statute into effect must be exercised within the powers delegated, that is to say, must be confined to details for regulating the mode of proceeding to carry into effect the law as it has been enacted, and it cannot be extended to amending or adding to the requirements of the statute itself; * * *

(Underscoring ours.)

On the same subject the following language is expressed in 11 American Jurisprudence at pages 955, 957 and 959, respectively:

" * * * The legislature may not, however, delegate to administrative officers the determination of what the law shall be or what acts are necessary to effectuate the law. * * *

" * * * 'There can be no grant to the executive of any roving commission to inquire into evils and, upon discovering them, to do anything he pleases to correct them.' * * *

" * * * Moreover, regulations promulgated by administrative departments may not extend the statute or modify its provisions."

It will be noted upon an examination of the rules and regulations sought to be promulgated by the Division of Industrial Inspection that they enlarge and extend the provisions of Section 10161 and prescribe acts which are deemed to be violative of this section; they are not limited to prescribing a mode of procedure to carry out the provisions of the act but go farther and, we believe, encroach on the power of the Legislature to make laws.

Rule No. 6 provides that the Director of the division may revoke the license of employment agencies violating any of these rules.

In 16 Corpus Juris Secundum, at page 374, the general rule of law on this subject is expressed as follows:

"The legislature may ordinarily confer upon an executive officer or board the power to revoke licenses for causes stated by the legislature, the discretion exercised by the board in such circumstances being not legislative, but administrative, in character. On the other hand, the legislature cannot empower an executive body to determine what causes shall constitute grounds for revoking or suspending a license. * * *"

In Section 10161, Revised Statutes of Missouri, 1939, the Legislature has provided that the Commissioner (now Director) may revoke the licenses of those agencies which have violated any of the provisions of Sections 10161 to 10165. Under the above authority it is doubtful if the Legislature could even by express authority delegate to the Director the power to set up additional causes for the revocation of licenses. If it cannot be done by direct and express authority, it certainly cannot be done by implied authority.

Conclusion

It is therefore the opinion of this office that the Director of the Division of Industrial Inspection does not have the authority

Mr. Lon N. Irwin, Director

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to promulgate and enforce rules and regulations, governing the operation of employment agencies, such as have been submitted herewith.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

INSURANCE-REINCORPORATION
OF COMPANIES:

Insurance companies organized under the provisions of Art. III, Chapter 37, R.S. Mo. 1939, may reincorporate under the provisions of Art. IV, Chapter 37, R.S. Mo. 1939, to make insurance on the stipulated premium plan.

February 19, 1948



Honorable Owen G. Jackson
Superintendent, Division of Insurance
Department of Business and Administration
Jefferson City, Missouri

Dear Superintendent Jackson:

This will acknowledge your request for an opinion, respecting the re-incorporation as a stipulated premium plan insurance company under the provisions of Article IV, Chapter 37, R.S. Mo. 1939, by an insurance company originally organized under the provisions of Article III, Chapter 37, R.S. Mo. 1939.

Your letter is as follows:

"Will you please advise this Division concerning the right of an insurance company organized under the provisions of Article III, chapter 37, R.S. Mo. 1939, to reincorporate as a stipulated premium plan or stock insurance company under the provisions of Article IV, chapter 37, R. S. Mo. 1939.

"Your records will indicate that under date of June 26, 1946 this question was presented to you in connection with the application for such reincorporation by the National Savings Life Insurance Company. The request for this opinion was subsequently withdrawn."

Article IV, Chapter 37, R.S. Mo. 1939, was originally passed as Senate Bill 283, Laws of Missouri, 2899, page 360. The Act has remained in the several revisions of our statutes and now remains in the revision of 1939, almost precisely in the same language and provisions employed in the sections as they were constituted when the Act was originally passed.

Honorable Owen G. Jackson

Section 5886, dealing with domestic companies, which is under specific discussion here, was numbered Section 17 in the original act, Laws of Missouri, 1899, page 265.

Section 5890, of said Article IV, dealing with foreign companies was, in the original Act, Laws of Missouri, 1899, numbered Section 20, pages 266, 267.

The subject of your request for this opinion requires the construction of the terms of Section 5886 of said Article IV, particularly with respect to the wording used in said Section 5886 composing the phrase "existing or doing business in this state at the time this article takes effect".

That part of said Section 5886 pertinent to the preparation of this opinion is as follows:

"Any domestic life or accident corporation, company or association existing or doing business in this state at the time this article takes effect, may, by the vote of a majority of its board of directors or trustees, accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all the provisions and privileges of this article the same as if it had been originally incorporated thereunder, and it shall file such amended articles of incorporation in the office of the secretary of state, a certified copy of which shall be filed with the insurance department, and shall thereafter perpetually enjoy the same and be deemed to have been incorporated under this article.
* * *".

That part of Section 5890, R. S. Mo. 1939, pertinent to the preparation of this opinion is as follows:

"No corporation, company, association or society organized under the laws of any other state or territory of the United States, or the District of Columbia, or foreign companies shall transact business under the provisions of this article until it has received from the superintendent of insurance a certificate of authority to do business in this state, a duplicate of which shall be filed in his office.
* * *".

Honorable Owen G. Jackson

Section 5890, in the original Act, Section 20, pages 266, 267, Laws of Missouri, 1899, respecting foreign insurance companies, is here quoted and referred to as a comparative method to demonstrate that the Legislature did not intend by the terms of said Section 5886 to require of domestic insurance companies desiring to reincorporate from existence under said Article III to a company under said Article IV to carry on an insurance business under the stipulated premium plan, greater burdens than are placed upon foreign insurance companies originally organized under said Article III desiring to reincorporate under said Article IV to carry on insurance business under the stipulated premium plan.

The primary rule of construction of statutes announced and followed by the Supreme Court of Missouri, and pronounced and followed in every jurisdiction, so far as we are advised, is that a statute must be construed to give effect to the intent of the Legislature in passing the Act. 59 C.J., pages 948-949, states the rule generally, as follows:

"As the intention of the legislature, embodied in a statute, is the law, the fundamental rule of construction, to which all other rules are subordinate, is that the court shall, by all aids available, ascertain and give effect, unless it is in conflict with constitutional provisions, or is inconsistent with the organic law of the state, to the intention or purpose of the legislature as expressed in the statute.
* * *".

The further rule of construction is followed, without exception, by Courts and text writers, that the spirit rather than the letter of the statute must be the guiding means with respect to the construction of a statute, to arrive at the intention of the Legislature. 59 C.J., pages 964-966, states the rule as follows:

"In pursuance of the general object of giving effect to the intention of the legislature, the courts are not controlled by the literal meaning of the language of the statute, but the spirit or intention of the law prevails over the letter thereof, it being generally recognized that whatever is within the spirit of the statute is within the statute although it is not within the letter thereof, * * *".

One Missouri case, among many cases adjudicated by our Supreme Court, is the case of Perry vs. Strawbridge, et al., 209

Honorable Owen G. Jackson

Mo. 621, upholding the above quoted rule of construction. That case, l.c. 639, quoting Black on Interpretation of Laws, states the following:

"* * * 'A statute should be construed with reference to its spirit and reason; and the courts have power to declare that a case which falls within the letter of a statute is not governed by the statute, because it is not within the spirit and reason of the law and the plain intention of the Legislature.' * * *".

The Court at the end of the quote further states:

"* * * This rule finds support in case after case as we read them in the books."

It is, therefore, reasonable to say, as we view the two sections--5886 and 5890--, that the Legislature did not intend to discriminate against domestic companies under Section 5886 and in favor of foreign companies under Section 5890, which permits foreign companies to reincorporate and become Article IV companies regardless of when or under what circumstances they may have been organized, while under Section 5886 domestic companies are required to be actually existent or transacting business at the time Article IV took effect before they could change their corporate existence in any separate case from that of a company doing business under some other plan, to a company authorized to do business under the stipulated premium plan.

Besides, we have Section 5894 in the same Article IV of Chapter 37, R.S. Mo. 1939, following said Section 5886, which, in part, is as follows:

"Any life or accident corporation, company or association organized under the laws of this state may avail itself of the rights and privileges accorded by section 5886, R.S. 1939, by compliance with the terms of said section, and on approval by the superintendent of insurance, * * *".

Considering the terms of the three sections, 5886, 5890 and 5894, one may reach the reasonable conclusion that it was intended for all three of said sections to harmonize with respect to permitting the reincorporation of insurance companies organized under other articles or chapters either foreign or domestic, to have and exercise the same privilege of converting their respective organizations

Honorable Owen G. Jackson

into companies to transact insurance business on the stipulated premium plan under said Article IV, and that there is no conflict between the three sections.

That part of said Section 5894 quoted above gives the positive and absolute right to any life or accident insurance company organized under the laws of this State to reincorporate under the terms of said Section 5886, and to avail itself of all the rights and privileges accorded to domestic companies whether organized before or after said Article IV, Chapter 37, R.S. Mo. 1939, took effect.

We think it does not detract from or change the terms of said Section 5894, part of which is hereinabove quoted, because the latter part of said section adds in the conjunctive, the right to exercise certain other privileges after a domestic company has been reincorporated under the terms of said Section 5886 to transact business on the stipulated premium plan.

It clearly appears from the terms of said Section 5894 that any domestic company in this State organized at any time under Article III, Chapter 37, R.S. Mo. 1939, may change to a company authorized to transact business of insurance under the terms of Article IV of said Chapter 37.

CONCLUSION

It is, therefore, the opinion of this Department, considering the foregoing, including the statutes of this State, cited and quoted, that an insurance company organized under the provisions of Article III, Chapter 37, R.S. Mo. 1939, may avail itself of the rights and privileges accorded by Section 5886, R.S. Mo. 1939, by compliance with the terms of said Section, and on approval by the Superintendent of Insurance.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INSURANCE: It is not mandatory for insurance companies or associations doing business on the stipulated premium plan, (under section 5885, Article IV, Chapter 37, R. S. Mo. 1939,) to obtain an application for insurance before issuing the policy, or to attach an application to a policy when issued.

March 10, 1948

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Honorable Owen G. Jackson
Superintendent of Insurance
Department of Business and Administration
Jefferson City, Missouri

Attention: Honorable Ralph C. Lashly,
Counsel

Dear Mr. Jackson:

This will acknowledge your letter requesting an opinion from this department, construing the terms of Section 5885, Article 4, Chapter 37, R. S. Mo. 1939, as to whether said section is mandatory in requiring every insurance company doing business under said Article 4, to obtain an application for insurance before such company may issue a policy. The letter requesting an opinion on the subject comes from Mr. Ralph C. Lashly, Counsel for your department.

The letter is as follows:

"Will you please advise this Division of your opinion on the following question:

"Does Section 5885, Article IV, Chapter 37, Revised Statutes of Missouri, 1939, make mandatory upon every company or association doing business under and by virtue of this Section to obtain an application for insurance before the company or association may issue a policy?"

The inquiry in the letter requesting this opinion is, whether said section makes it mandatory upon every company or association doing business under Article 4 of Chapter 37, to obtain an application for insurance before a company or an association may issue a policy. The terms of the statute are, as will be readily observed, that such a company shall, upon the issuance of every policy, attach to such policy or endorse thereon, the substance of the application upon which such policy was issued. Said Section 5885 nowhere uses language requiring or directing that an application shall be obtained before a policy may be issued. We take it, then, that the request for the opinion is directed more to the question of whether a copy of an application shall be

attached to the policy upon the issuance of a policy, rather than whether it is mandatory that an application be obtained before a policy is issued. We shall, however, answer both questions.

It will be observed that said Section 5885 provides no penalty for failure to comply with the terms of said section. Neither is there any provision rendering the contract illegal or void for failure to observe the requirement of said section that a copy of the application shall be attached to each policy issued by a company operating under said Article 4, Chapter 37.

It has been held in many decisions by our Courts of Appeals that the terms of said Section 5885 apply only to insurance companies doing business on the stipulated premium plan. In the case of Craig et al. vs. Insurance Co., 220 Mo. App. 913, our St. Louis Court of Appeals had before it the question of whether the terms of the statute, then Section 6184, R. S. Mo. 1919, now Section 5885, applied to old line insurance companies or solely to companies doing an insurance business on the stipulated premium plan. The Court in its decision, and holding that said section requiring a copy of the application to be attached to a policy when issued applied only to stipulated premium companies, l.c. 918, said:

"In light of the fact that the case may be re-tried, we note that the court erred in holding that section 6184, Revised Statutes of Mo. 1919, the alleged defense of misrepresentation made by the insured in his application was not available to the defendant, because the application for the insurance was not attached to the policy of insurance itself. The policy in suit being issued upon a level or flat rate premium, or in other words, being an old line policy and not a policy issued upon the stipulated premium plan, said section has no application.* * *"

It thus appears that the intention of the Legislature in enacting said Section 5885 requiring a copy of the application for insurance issued under the stipulated premium plan was to provide for a truthful statement of the condition of health of an applicant for insurance, and for the availability of such statements as a defense to the insurer upon an action on a policy to show fraud or misrepresentation of the condition of health of the applicant at the time or before the making of the application, if it were revealed that there were false statements concerning the applicant's health made in the application. 32 C.J. 1104 states the following text on the purpose and office of a written

application for insurance as follows:

"* * *The purpose of signing an application is to bind the applicant to the truth of the statements therein; and the fact that he signed a particular paper tends to show that it is not a mere memorandum for the convenience of an agent of the company, but rather that the applicant adopted it as an application.* * *"

This feature of said statute, was for the benefit of the insurer. The availability of misrepresentation as a defense being for the benefit of the insurer, such defense may be waived, and the effect of such waiver is to deny the right to the insurer to introduce evidence showing misrepresentation or false statements by an applicant in the application, unless the copy of the application be attached to a policy upon its issuance. The case of Hicks vs. Insurance Co. was considered by our St. Louis Court of Appeals, and is reported in 196 Mo. App. Rep. 162. The case, among other issues, presented the question for the decision of the Appellate Court, the action of the trial court in overruling the demurrer to the evidence by the appellant Insurance Co., the demurrer being based upon alleged misrepresentations of the health of the insured in the application prior to the issuance of the policy sued on. In affirming the decision in the lower court, and in holding that the defense of misrepresentation was not available to the insurer because a copy of the application was not attached to the policy, the Court of Appeals, l.c. 171, said:

"As to this it should be stated at the outset that the defense predicated upon alleged misrepresentations made by the insured in obtaining the policy of insurance, consisting of alleged false answers in the written application therefore, was not available to defendant under the circumstances of the case, and that the trial court should have excluded this application upon plaintiff's objection thereto. This is for the reason that the record discloses that neither the application nor the substance thereof was attached to or indorsed upon the policy as required by section 6978, Revised Statutes 1909. By failing to comply with the statute, the defendant lost the right to avail itself of the application as a means for invalidating the policy. This we have but recently held in Schuler v. Metropolitan Life Ins. Co., 191 Mo. App. 52,

176 S.W. 274, where, in an opinion by REYNOLDS, P. J., the question is fully considered and the authorities cited and discussed."

It appears to be the almost universal practice for a written application to be made for insurance on the stipulated premium plan, and all other kinds of life, health and casualty insurance for that matter, and the assumption is that such applications are made and that they are made in writing. But it is conceivable that if a policy were issued by an insurer and delivered without an application to a person and such person accepted the policy, and paid his premium, the policy would be in force. In other words, the policy would not be invalid in such case by reason of there being no application, and forfeiture or avoidance of the policy could not be urged by the insurer for such cause. 32 C.J. 1102, on that principle, states the following:

"* * *The agreement is usually affected by an offer or application by insured and its acceptance by the company, or else by the tender of a policy by the company and its acceptance by insured. Where the latter method is employed, the fact that the policy is issued without prior application by insured does not prevent its going into effect.* * *"

32 C.J. 1119 again treats of this principle with the following text:

"* * *Generally, however, the statutes expressly prescribe the effect of non-compliance therewith, such as that the application shall not be considered a part of the policy or contract, and that it shall not be pleaded or received in evidence; but they also sometime expressly provide that the omission shall not render the policy invalid. By the weight of authority, the failure of the company to comply with the statute precludes it from showing that statements of insured in the application are false and fraudulent.* *"

As hereinabove stated, there is no penalty provided in Section 5885 for its non-observance with respect to failing to attach a copy of the application to a policy of insurance under the stipulated premium plan upon the issuance of the policy.

A penal statute is defined in 59 C.J. 1110 in the following text:

"* * *In common use, however, this sense has been enlarged to include under the term 'penal statutes' all statutes which command or prohibit certain acts, and establish penalties for their violation, * * *"

The provision in said Section 5885 requiring the application to be attached to a policy under the stipulated premium plan of insurance being for the benefit of the insurer may be waived by the insurer. 32 C.J. 1316, 1317, states the rule on this principle as follows:

"In the absence of statutory inhibition, as a general rule doctrines of waiver and estoppel may be applied to preclude the company from asserting any ground upon which it might be entitled to avoid the policy or dispute its liability thereunder. The company is entitled to waive provisions inserted in the contract for its benefit, and this even where the policy, according to its express terms, is under the circumstances to be void."

In the case of Bersche et al. vs. Insurance Co., 31 Mo. 546, our Supreme Court considered the question and principle of waiver as it applied to misrepresentation by the insured as a defense by the insurer. The Court, 1.c. 554, on the point said:

"Misrepresentation is therefore put by the contract upon the same footing with all other things which may happen to increase the risk, and the courts have frequently held that such defences may be waived.* * *".

It is apparent that the terms of said Section 5885 in failing to provide a penalty for the non-observance of the statute, and failing to provide that the statute shall be void upon its non-observance, renders the statute directory rather than mandatory.

59 C.J. 1072, Section 630, in discussing the rules of construction of statutes states, in part, the following:

"A mandatory provision in a statute is one, the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding; * * *".

Our Supreme Court in the case of State vs. Brown, 33 S.W. (2d) 104, discussed the distinction between a mandatory provision and a directory provision of statutes involving the election laws of the State. The Court adopted in its decision, and as its definition and construction of mandatory and directory provisions in a statute, a text statement of law, and in so doing, i.e. quoting R.C.L., Sec. 14, pages 766, 767, said:

"A mandatory provision is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequence of not obeying them in every particular are not prescribed the courts must judicially determine them. There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory.' * * *".

We believe the above text authorities and decisions by our Courts make it reasonable to assume that the insurer company should obtain an application for insurance before such company or association may issue a policy, but it is not mandatory under said Section 5885 to obtain an application before the company may issue a policy, or that such company attach an application for insurance to a policy at the time of the issuance of such policy.

CONCLUSION

It is, therefore, the opinion of this Department that:
1. Section 5885, Article 4, Chapter 37, R. S. Mo. 1939, does not make it mandatory upon companies or associations doing

Hon. Owen G. Jackson

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business under and by virtue of said Section 5885 to obtain an application for insurance before such companies or associations may issue a policy.

2. It is further the opinion of this Department that it is not mandatory under said Section 5885 that a company doing business on the stipulated premium plan under Article 4, Chapter 37, R. S. Mo. 1939, attach to the policy at the time of the issuance thereof, an application for insurance.

Respectfully submitted,

GEORGE W. CROWLEY.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JB*
Attorney General

GWC:ir:mw

MUTUAL INSURANCE COMPANIES
ORGANIZED UNDER ARTICLE 7,
CHAPTER 37, R. S. MO. 1939.

Such companies under H.B. 498,
may write multiple insurance
lines, including fire insurance
and thereby are subjected to
all of the provisions of Ar-
ticle 8, Chapter 37, R. S. Mo.
1939.

April 22, 1948

Honorable Owen G. Jackson
Superintendent of Insurance
Jefferson City, Missouri



Dear Mr. Jackson:

This will acknowledge your letter requesting advice from this department on the subject matter which will be herein later discussed, especially calling attention to a former opinion of this department on the question of whether insurance companies organized under Article 7, Chapter 37, R. S. Mo. 1939, are subject to the provisions of Article 8 of said chapter, under H.B. 498, found in Laws of Missouri, 1945, page 1014. Your letter states:

"Will you please advise this Department whether Section 5904, Revised Statutes of Missouri, 1939, as amended by House Bill No. 498, will change the conclusion reached in your opinion, copy of which is attached hereto, directed to the Superintendent of Insurance under date of December 27, 1945, with particular reference to conclusion 'A' of said opinion? Section 5904, supra, contains the following proviso:

"'and provided further, that any company operating under Article 7 and electing to effect insurance against the risk of loss by fire, shall, with respect to such fire insurance business, be subject to Sections 5905, 5907 and 5923 to 5940, inclusive, of Article 6, Revised Statutes of Missouri, 1939, and with respect to such fire insurance business shall also be subject to all of the provisions of Article 8, Revised Statutes of Missouri, 1939, which are applicable to mutual fire insurance companies;'

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"Is it now necessary 'that any insurance company operating under Article 7' and writing fire insurance on automobiles, be subjected to the provisions of Article 8, and the other statutes enumerated therein, or does this proviso refer only to insurance companies qualifying to write multiple lines?"

We are writing an additional opinion covering the questions you submit in your letter as relating to said paragraph (a) of the conclusion in said former opinion.

Paragraph (a) of the former opinion of this department, dated December 27, 1946, is as follows:

"a) Mutual insurance companies organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939, are not subject to the provisions of Article 8, Chapter 37, R. S. Mo. 1939, vesting in the State Department of Insurance regulation and control over rates charged for specific types of insurance;"

House Bill 498, as referred to in your letter, is now published in Laws of Missouri, 1945, at page 1014, under the title of "INSURANCE: relating to insurance other than life."

The particular quotation appearing in your letter in the second paragraph thereof, appears on page 1017, being a part of Section 5904, as amended, Laws of Missouri, 1945, and for the sake of clarity and understanding, we repeat it here as follows:

"* * * and provided further, that any company operating under Article 7 and electing to effect insurance against the risk of loss by fire shall, with respect to such fire insurance business, be subject to Sections 5905, 5907 and 5923 to 5940, inclusive, of Article 6, Revised Statutes of Missouri, 1939, and with respect to such fire insurance business shall also be subject to all of the provisions of Article 8, Revised Statutes of Missouri, 1939, which are applicable to mutual fire insurance companies; * * * * *."

This new section in said H.B. 498 in the first proviso, l.c. 1017, provides that any stock company which has a fully paid capital

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of not less than \$400,000.00, or any mutual company that maintains a guaranty fund of policyholders' surplus of not less than \$400,000.00 may make insurance on all three classes of insurance enumerated in said section. It simply allows stock companies to write all lines except life when they have a capital of \$400,000.00 and extends like powers to a mutual with \$400,000.00 surplus. That is, both the stock and the mutual companies can write all lines, either fire and/or casualty and/or marine when so capitalized.

It will be observed, we think, with clearness that said H.B. 498 permits mutual insurance companies organized under said Article 7, Chapter 37, R. S. Mo. 1939, to write insurance on all three classes of property mentioned in said section. It is plain, we believe, that said H.B. 498, as expressed in said new Section 5904, applies to companies organized under both Articles 6 and 7 of said Chapter 37, R. S. Mo. 1939, in writing the three lines of insurance mentioned in said Section 5904, Laws of Missouri, 1945, page 1014.

Said Section 5904 in providing that companies operating under Article 7, and electing to effect insurance against the risk of loss by fire, and further providing that such mutual companies shall be subject to Sections 5905, 5907, and 5923 to 5940, inclusive, of said Article 6, and with respect to such fire insurance business shall also be subject to all other provisions of Article 8, Revised Statutes of Missouri, 1939, which are applicable to mutual fire insurance companies, means that such companies organized and operating under said Article 7, aforesaid, electing to do fire insurance business must be permitted to write such insurance, and are thereby placed under the supervision and control of the Division of Insurance of this state, as to fixing of rates and all other requirements in the named sections, including fire insurance rates on automobiles.

CONCLUSION

1) Considering the above statutes and the provisions of said H.B. 498 it is the opinion of this department that conclusion (a) of the opinion of this department of December 27, 1946, should be changed to hold that mutual insurance companies organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939, are subject to the provisions of Article 8, Chapter 37, R. S. Mo. 1939, vesting in the State Department of Insurance the regulation and control over rates charged for specific types of insurance.

2) That mutual companies organized under Article 7, Chapter 37, R. S. Mo. 1939, may elect to write policies covering the hazard of fire insurance under the terms of H.B. 498 providing such companies have the capital or surplus required by said H.B. 498.

Honorable Owen G. Jackson

3) That by so electing to write fire insurance policies under the multiple privilege granted in Section 5904 (H.B. 498), companies organized under said Article 7 are thereby made subject to Sections 5905, 5907 and 5923 to and including 5940 of Article 6, R. S. Mo. 1939; and that such companies writing fire insurance business shall also be subject to all provisions of Article 8, R. S. Mo. 1939, which are applicable to mutual fire insurance companies.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

INSURANCE COMPANIES ORGANIZED
UNDER ARTICLE 7, CHAPTER 37,
R. S. MO. 1939

Insurance corporations organized under Article 7, Chapter 37, R. S. Mo. 1939, may issue a policy on personal property, known as a "floater" policy that might involve loss by fire in transportation.

April 23, 1948



Honorable Owen G. Jackson
Superintendent of Insurance
Jefferson City, Missouri

Attention: Honorable Ralph G. Lashly

Dear Superintendent Jackson:

This will acknowledge your letter in which you request the opinion of this department whether insurance companies organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939, are authorized to write the various forms of inland marine floater policies. Your letter is as follows:

"Will you please advise whether in your opinion an insurance company organized under the provisions of Article 7, Revised Statutes 1939, is authorized to write insurance covering loss against fire.

"The specific case, which has been presented, is that of an Article 7 company writing what is known as a 'personal property floater' policy, which covers the insured against any or all loss to personal property except certain named exclusions. Fire coverage is not one of the exclusions and is one of the hazards covered by the policy.

"An attempt has been made to distinguish between fire insurance on property at a definite, specified location and fire insurance on personal property, which may be or is being moved from one location to another and is not in place and at a definite specified location.

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"The distinction has been carried to the extent that Article 7 companies contend that the latter, that is, insurance against loss by fire of personal property, not at definite specified location does not constitute fire insurance as that term is used in Section 5955, R. S. Mo. 1939.

"This Department has taken the position that fire insurance or insurance against loss by fire means just what the term implies, whether it is contained in a policy of fire insurance or in a personal property floater. The indemnity provided is the same in both cases."

The particular question here submitted is whether or not a Missouri insurance company organized under Article 7, Chapter 37, R. S. Mo. 1939, may write the various forms of inland marine floater policies.

Section 5904 as amended, Laws Missouri, 1945, page 1014, Chapter 37, R. S. Mo. 1939, provides in the first subdivision of said section that an insurance corporation may be formed for the following purposes; "First, to make insurance on houses, buildings, merchandise, furniture, and all kinds of property, against loss or damage by fire, lightning, hail and windstorm and earthquake; to make all kinds of insurance on ships, steamboats and other vessels, and their freight and cargoes, and also on goods, merchandise, produce, and all other kinds of property in the course of transportation, either by land or water, and to lend money on bottomry and respondentia * * *".

Section 5955, Art. 7, Chapter 37, R. S. Mo. 1939, hereinafter again discussed, provides:

"1. Any company organized under the provisions of this article is empowered and authorized to make contracts of insurance or to reinsure or accept reinsurance on any portion thereof, to the extent specified in its articles for the kinds of insurance following:

* * * * *

"Miscellaneous insurance. Against loss or damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

Honorable Owen G. Jackson

The language of the provision quoted from said section 5904, we believe, makes it clear that an insurance company may be incorporated under said section "to make insurance on houses, buildings, merchandise and furniture and all kinds of property against loss or damage by fire, lightning, hail and windstorm and earthquake." This provision of the statute evidently refers to fire, lightning hail and windstorm and earthquake insurance as such on all property while contained in or while being upon property having a definitely fixed location. Said section 5904, supra, then next provides that insurance companies may be incorporated to write marine and transportation insurance as a definite and different kind of insurance as follows: "to make all kinds of insurance on ships, steamboats and other vessels and their freight and cargoes and also on goods, merchandise, produce and all other kinds of property in the course of transportation, either by land or water, * * * *" (all underscoring ours). This would be an inland marine company. Such company would not have the charter powers to write fire insurance, as such, provided for in the first clause of Section 5904, as amended, Laws Missouri, 1945, page 1015, l.c. 1016, but its policies of marine or transportation insurance would cover the marine or transportation risks under that class of insurance provided for in said Section 5904, even though the loss might arise from fire.

We think said Section 5904 would permit the incorporation of a company to write both fire and marine insurance. There have been such companies organized in this state, and which have transacted insurance business in this state, for many years with apparently no question ever having been raised as to the validity of such dual purpose of organization or of doing the business of writing both fire and marine insurance. One difficulty with said Section 5904 is that it does not set out separately and distinctly the authority to write fire insurance on the one hand, and marine or transportation insurance on the other hand. But a careful reading of said section makes it very clear that they are two separate and distinct lines of insurance provided for in the first subdivision of said section 5904.

The question here under consideration was decided by the Supreme Court of Wisconsin, in the case of Northwestern National Insurance Company vs. Mortensen, 284 N.W. 13, l.c. 16 (1-3). The Supreme Court of Wisconsin in deciding that case said:

"The plaintiff is licensed to write fire insurance, and is therefore, under Sec. 203.33, subject to the rating law. It is also licensed to write marine insurance. Sec. 203.42, Stats., provides that no insurer shall intentionally charge a different rate from that which

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has been filed with the bureau. Does this mean that the plaintiff, being subject to the rating act because licensed to write fire insurance, must file rates for its marine policies also, excepting only such as relate to property of or in the hands of common carriers? It seems apparent that the legislature did not so intend, and that, as the plaintiff contends, the legislature recognized the existence of marine insurance as something entirely distinct from fire insurance. In legislating with reference to fire insurance it was not necessary to except from the fire rating act marine insurance, because the distinction between the two types of insurance existed without specific provision."

The proviso clause of Section 5905, R. S. Mo. 1939, as amended Laws 1941, page 402, l.c. 404, confirms the distinction intended to be made and which was made, by the Legislature in defining two distinct lines of insurance as provided in the first subdivision of said Section 5904, by further providing in said proviso of said Section 5905 the following:

"* * * provided further, that existing corporations which by their charters are authorized to do the business of fire, or marine, or fire and marine insurance may, without amending their charters, make any one or more kinds of insurance now or hereafter permitted to such corporations."

It is thus made apparent that the Legislature in Section 5904 intended to provide and did provide for fire insurance, marine insurance, or fire and marine insurance, and in the next section, 5905, gave conclusive evidence in confirmation of such intention.

There can be no question, we think, that said Section 5904, in the first subdivision thereof, by authorizing insurance corporations organized thereunder "to make all kinds of insurance on ships, steamboats and other vessels and their freight and cargoes and also on goods, merchandise, produce and all other kinds of property in the course of transportation either by land or by water * * *" means that what is popularly termed floater policies may be written by such companies to cover any risk incident to such transportation either by land or water.

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This character of insurance has been recognized as legitimate, and such policies have been upheld by the Courts wherever and whenever the parties to the contract agreed upon such a policy. 26 C. J., page 96, states the following test on the principle:

"Shifting location. 'Floating' policies are policies intended to cover property or value which cannot well be covered by specific insurance because of the fact that the property is changing in quantity or location. A so-called 'drummer floater' policy on the property of a salesman 'while traveling' covers the property while he is on the road, including necessary interruptions of his journey, but not after it has been returned to the starting point.* * *".

The Supreme Court of Missouri had before it the case of Wilson vs. Hartford Fire Ins. Co., 300 Mo. 1. The question of the validity of a "floating policy" was involved in the case. In holding such a policy valid when agreed upon by the parties to the contract, our Supreme Court, l.c. 52, said:

"* * *Not only therefore by the express agreement of the parties but in contemplation of law the Globe & Rutgers may be designated as a floating policy. The texts and cases tell us that a floating policy is one intended to supplement specific insurance on property and attaches only when the latter ceases to cover the risk. (Cutting v. Atlas Ins. Co., 199 Mass. 380; Peabody v. Liverpool Ins. Co., 171 Mass. 114; Bloch v. Am. Ins. Co., 132 Wis. 150.) The reason for the creation and the purpose of this character of policy is to provide indemnity for property which cannot because of its frequent change in location and quantity be covered by specific insurance * * *".

Insurance companies organized under Article 7, Chapter 37, R.S.Mo. as hereinabove noted, have, in addition to the authority contained in the provisions of said Sections 5904 and 5905, supra, the authority to write floater policies on personal property in transportation. Such provisions are set forth in Subsection (7) of Section 5995, R. S. Mo. 1939 authorizing them to write insurance, as follows:

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"Miscellaneous insurance. Against loss of damage by any hazard upon any risk not provided for in this section, which is not prohibited by statute or at common law from being the subject of insurance, excepting life insurance and fire insurance."

The writing of floater policies on personal property is not only not prohibited by statute, as recited hereinabove at length, but, on the contrary, is positively authorized by said Sections 5904 and 5905, supra. The provisions then of said Subsection (7) of said Section 5955 providing that companies organized under said Article 7 may write Miscellaneous insurance are comprehensive and conclusive to the end that such companies may write personal property floater policies under said Section 5955.

CONCLUSION

It is, therefore, under the above cited statutes and authorities, the opinion of this department that insurance corporations organized under the provisions of Article 7, Chapter 37, R. S. Mo. 1939, may write the various forms of inland marine personal property floater policies on ships, steamboats and other vessels and their freight and cargoes, and also on goods, merchandise, produce and all other kinds of property in the course of transportation, either by land or by water which may involve the hazards of fire while in transportation.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

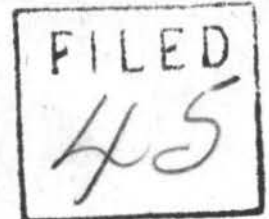
J. E. TAYLOR
Attorney General

LIFE AND ACCIDENT INSURANCE: A domestic life or accident insurance corporation may, under the terms of Section 5886 and Section 5894, Article 4, Chapter 37, R.S. Mo. 1939, reincorporate to carry on insurance on the stipulated premium plan. The direction and handling of the business of such reincorporated insurance company must be done and performed by the board of directors of the reincorporated company.

October 12, 1948 : the reincorporated company.

Honorable Owen G. Jackson
Superintendent
Division of Insurance
Jefferson City, Missouri

10-13



Dear Superintendent Jackson:

This will acknowledge the receipt of your letter requesting the opinion of this Department as to the legality of the proceedings of Capital Mutual Association, a mutual insurance company located at Jefferson City, Missouri, to change its corporate entity and existence from a mutual insurance company on the assessment plan under Article 3, Chapter 37, R.S. Mo. 1939, to an insurance company on the stipulated premium plan, and to be reincorporated under the corporate name of Capital Reserve Life Insurance Company, pursuant to the provisions of Article 4, Chapter 37, R.S. Mo. 1939. Your letter is as follows:

"We enclose herewith executed copy of the proceedings of the above named company in connection with amendments to its Articles of Incorporation and reincorporation as a stipulated premium company under Article IV of our law. We also enclose for your study and information a copy of the proposed by-laws of the new company.

"Will you please advise this Division whether the proceedings are in compliance with our statutes and not in conflict with the Constitution of the State of Missouri or of the Constitution of the United States.

"In passing upon the sufficiency of the enclosed Articles, it is assumed that you will give due consideration to the fundamental question of whether such a reincorporation from a mutual assessment company under Article III, to a stipulated premium company,

a stock company, under Article IV, is in fact permissible under our present statutes. The question arises as to whether the procedure followed by the company is in reality for a reincorporation or an entirely new corporation. If a reincorporation, would action by members of the present association be necessary before the directors would be authorized to change the corporate structure? And should action by the Circuit Court also be necessary in such instance, since it was originally incorporated by decree of such court?

"The question also arises as to what disposition is to be made of the surplus in the expense and mortuary funds, and the rights of the various policyholders thereto, both those who go with the new corporation and those who elect to keep their old policies. And further, the problem of how to value the new outstanding insurance contracts, of re-writing all such contracts and the procedure to follow in case additional assessments are made seems important in this general picture for solution.

"In case this should be approved as an entirely new corporation, then it appears the question of acquiring the assets of the present association by a reinsurance agreement under Section 5859 would require some consideration.

"These and other pertinent questions have arisen in our minds in the consideration of this overall problem. Therefore, in addition to passing upon the sufficiency of the form of the Articles enclosed, we respectfully request that you render us an opinion covering the various points involved, in the request for approval of the Articles herein presented, and whether under the present law such reincorporation is permissible."

For our convenience, information and in the preparation of this opinion you have transmitted to us a certified copy of the proposed Articles of Incorporation of Capital Reserve Life Insurance Company in the nature of an amendment to the Articles

of Incorporation of the said Capital Mutual Association which said Articles were proposed, adopted and made effective by the action of a majority of the Board of Directors of Capital Mutual Association at a meeting of the Board of Directors of Capital Mutual Association held on the 21st day of May, 1948, to accept, and thereby did accept, the provisions of said Article IV and did thereby amend its Articles of Incorporation to conform to the provisions of said Article IV, so as to cover and enjoy any and all of the provisions and privileges of said Article IV the same as if the said Capital Reserve Life Insurance Company had been originally incorporated thereunder.

You also transmitted a copy of the proposed by-laws of Capital Reserve Life Insurance Company under which it will operate if and when it is so reincorporated under the terms of said Article IV, Chapter 37, R.S. Mo. 1939.

Your letter submits a number of questions which we will consider separately since each of them, while correlative with each other on the general subject of incorporation, or reincorporation of an insurance company under the terms of said Article IV, each requires, we think, separate consideration and the citation of different authorities and demands the application of different lines of reasoning. These submissions of questions for this opinion are not numbered serially, nor in fact, separately, in your letter, but we shall endeavor to paragraph them in order that this opinion, as to each of them, will be the more readily understood.

We will defer the answer to the question in paragraph 2 of your letter as to the constitutionality of the proceedings here being considered and reply to that question later in the opinion. In paragraph 3 of your letter you submit the question for our consideration whether "such a reincorporation from a mutual assessment company under Article III, to a stipulated premium company, a stock company, under Article IV, is in fact permissible under our present statutes." The answer to this question is in the affirmative. Sections 5886 and 5894 of said Article IV provide abundant and positive authority for the reincorporation of an Article III mutual insurance company into an Article IV company to do an insurance business on the stipulated premium plan by the acceptance by the Article III mutual company of the provisions of said Article IV in an amendment to the Articles of Incorporation of an Article III mutual company, according to the particular provisions of Sections 5886 and 5894, of said Article IV, and to become effective upon the approval by the Superintendent of Insurance. We considered this question and

Honorable Owen G. Jackson -4-

gave you our opinion on February 19, 1948, that such reincorporation may be lawfully affected, in response to a renewed request from your Department for our opinion, a former request for an opinion on the subject having been previously withdrawn by you. We respectfully refer you to our said opinion of the date last mentioned, in confirmation of the affirmative answer here being given to the question.

Paragraph 3 of your letter next submits the following question: "The question arises as to whether the procedure followed by the company is in reality for a reincorporation or an entirely new corporation."

The certified copy of the Articles of Agreement of Capital Mutual Association as amended to reincorporate as Capital Reserve Life Insurance Company, supported by the copy of the by-laws of Capital Mutual Association, leave no doubt, it appears, that the scheme and plan proposed and effected was intended to be and is a reincorporation of the Article III mutual company into an Article IV stipulated premium company. The said Articles of Incorporation recite in detail the historical background of the existence of Capital Mutual Association as a mutual insurance company on the assessment plan organized and existing under and by virtue of the provisions of Article III, Chapter 37, R.S. Mo. 1939, and that Capital Mutual Association desires to reincorporate under the provisions of Article IV of Chapter 37, R.S. Mo. 1939, and Acts amendatory thereof, and particularly as provided in Section 5886 of said Revised Statutes of Missouri, 1939. It is further recited in the certified copy of said Articles of Incorporation that in the proceedings of the majority of the Board of Directors of Capital Mutual Association at its meeting held on May 21, 1948, they proposed to amend, and did amend, the Articles of Incorporation of Capital Mutual Association so as to conform said Articles of Incorporation to the provisions of Article IV, Chapter 37, R.S. Mo. 1939, and to cover and enjoy any and all of the provisions and privileges of said Article IV the same as if said Capital Mutual Association had been incorporated originally thereunder. And it is further recited therein, that for the purpose of carrying out and effectuating such reincorporation of Capital Mutual Association, the Articles of Agreement of said Capital Mutual Association "are hereby amended by adding thereto the following provisions:." Then follows as the amendment, the proposed Articles of Agreement of Capital Reserve Life Insurance Company. Nowhere in the record of the actions of Capital Mutual Association or in the recitation of its purpose and intention to reincorporate as an Article IV company is there the slightest indication or intimation that it intended to, or did, move in any manner toward the incorporation of a new corporation. It would

seem this would be sufficient upon which to predicate a fixed conclusion that these proceedings all signify a reincorporation of the Article III company into an Article IV company rather than incorporate an entirely new corporation. But in further proof that the purpose and intention of the movers in the amendment was to reincorporate rather than to originally incorporate, we refer to the contents of the proposed by-laws of the proposed Capital Reserve Life Insurance Company.

Article X of the proposed by-laws of Capital Reserve Life Insurance Company states that the Capital Reserve Life Insurance Company had heretofore been incorporated under the name of Capital Mutual Association under the provisions of Article III, Chapter 37, R.S. Mo. 1939, entitled, "insurance on the assessment plan." This was proper under the provisions of Section 5886 and constituted the admission of Capital Mutual Association of its former existence and that its future existence would be as a reincorporated company as and under an amendment to the Articles of Agreement of Capital Mutual Association to merge into and become known under the corporate name of Capital Reserve Life Insurance Company.

Also, in said Article X of the proposed by-laws of Capital Reserve Life Insurance Company, they assert that after the completed reincorporation of the Capital Mutual Association into Capital Reserve Life Insurance Company under the terms of said Article IV, as a stipulated premium company, they are merely changing their methods of doing business, but not changing the business itself, and that the former by-laws of Capital Mutual Association having become, under the law, a part of the policies issued by Capital Mutual Association when doing business on the assessment plan, such former by-laws of Capital Mutual Association are to be continued in full force and effect and shall govern the officers and agents of Capital Reserve Life Insurance Company in all the transactions relating to policies already written by Capital Mutual Association and remaining in force on the assessment plan. This, we believe, is in confirmation of the expressed intention for the change by amendment, of the Articles of Agreement of the Capital Mutual Association, an Article III company, to Capital Reserve Life Insurance Company, an Article IV company, to be a reincorporation of the old company under the new name and these statements offer satisfactory proof that this is what they did.

Were the proceedings here intended to result in the organization of a new Article IV corporation they would be confined exclusively to the provisions of Sections 5870 and 5871 of Article

IV, Chapter 37, R.S. Mo. 1939, respecting the number of persons associating themselves together for the formation of a new corporation according to Section 5870, and the contents of the Articles of Incorporation would have to show compliance with the terms of said Section 5871. The entire proceedings to organize a new corporation under Article IV would be entirely separate and distinct from any of the provisions of Sections 5886 and 5894 of said Article IV which provide for reincorporation of an existing company into an Article IV company. These things they have not done, nor have they by any of the proceedings of Capital Mutual Association or of the proposed Capital Reserve Life Insurance Company intimated that the object of the proceedings was to organize a new corporation. Indeed, before a new corporation could be organized and formed as an Article IV company under the facts here disclosed, the Article III assessment company would, of necessity, have to be liquidated, its affairs wound up, its existence be discontinued, its assets distributed among the members of the assessment company, and the corporation be dissolved. This has not been done, nor has any intimation been made in these proceedings or otherwise, looking toward that end.

Further observing the provisions of said Article X of said proposed by-laws of Capital Reserve Life Insurance Company, it is stated that the reincorporated company proposes to, and will, as Capital Reserve Life Insurance Company, continue and carry out the previous by-laws of Capital Mutual Association, respecting the policies remaining in force of Capital Mutual Association when and as it operated as a mutual assessment company under the provisions of said Article III, and that the funds accumulated when said company was operating as an Article III company will be administered to the interest and for the benefit of the remaining assessment members if they so desire, provided; that any assessment member, of his own volition, desiring to change his policy from an assessment policy to a policy on the stipulated premium plan to be issued to him by Capital Reserve Life Insurance Company, may do so and receive his equitable share of the funds of the assessment company in the form of part payment on the premium, or premiums, on such stipulated premium policy. This, we believe, further carries out the purpose and intention of reincorporating the former Article III mutual company into an Article IV stipulated premium company, and that this becomes a binding agreement upon the reincorporated stipulated premium company, and also demonstrates that it is a reincorporated company in fact, and not a new corporation.

The next question submitted in paragraph 3 of your letter is: "If a reincorporation, would action by members of the present association be necessary before the directors would be authorized

to change the corporate structure?"

If this proceeding constitutes a reincorporation of the old Article III company into an Article IV stipulated premium company, and we believe it does, then the matter of the change and reincorporation is governed by the provisions of Section 5886, Article IV, Chapter 37, R.S. Mo. 1939, and, therefore, the policyholders as members of the present mutual association as such would not be authorized to take any part in the reincorporation of the old assessment company to become an Article IV company. Said Section 5886 states, in part, that any domestic life or accident corporation desiring to effect a reincorporation of another company into an Article IV stipulated premium company, may, "by the vote of a majority of its board of directors or trustees, accept the provisions of this article and amend its articles of incorporation to conform to the same, so as to cover and enjoy any and all of the provisions of this article the same as if it had been originally incorporated thereunder." Section 5894, Article IV, Chapter 37, R.S. Mo. 1939, in giving further authority for such reincorporation does not change or in anywise depart from or alter the provisions of said Section 5886 as to who shall act for the company. Section 5894 refers specifically to said Section 5886 and the compliance therewith as necessary in order to effect the reincorporation provided for in said Section 5886. These sections furnish positive authority that a majority of the Board of Directors, or Trustees, of any company desiring to reincorporate under the terms of said Sections 5886 and 5894 may lawfully act for the company in that behalf without any action by the members of the present association.

The next question submitted in paragraph 3 of your letter is: "And should action by the Circuit Court also be necessary in such instance, since it was originally incorporated by decree of such court?"

We believe the fact that Capital Mutual Association was incorporated by the decree of a Circuit Court has nothing whatever to do with the question or proceedings of its reincorporation into an Article IV stipulated premium company. The decree of incorporation of a company by the Circuit Court of the county or city in which it is proposed to locate the chief office or place of business of the company, under Article III, Chapter 37, R.S. Mo. 1939, is authorized by the terms of Section 5857 of said Article III, but nowhere in said Article III do we find any authority for the Circuit Court granting the decree of incorporation to act in any matter of reincorporation of the company into an Article IV stipulated

premium company. Nowhere in said Article III do we find any provision for the Circuit Court to have jurisdiction of the dissolution of an Article III company. The matter of a dissolution would be left entirely to the disposition of the Superintendent of Insurance under the terms of Section 6052, R.S. Mo. 1939, and while he might lodge the proceedings for dissolution in the Circuit Court for good cause shown, he is not compelled to do so by the terms of said Article III. This is not a dissolution proceeding, however, and is only mentioned here for the reason that dissolution and winding up its affairs would be required of the old company in order to form a new corporation. The proceeding to reincorporate a previously organized insurance company into an Article IV stipulated premium company is left entirely to the terms of Sections 5886 and 5894.

It is generally recognized that a corporation in existence may reincorporate when it is authorized to do so by a special or a general statute, without becoming a new corporation. 14A C.J., page 1037, states this text on the principle:

"* * * By statute the corporation may as matter of right reincorporate under the same name, and may enforce the right by a writ of mandamus; or it may take a different name. A corporation may reincorporate in the same state without becoming a new corporation. * * * ."

The above text under footnote 9, pages 1037 and 1038, cites cases decided by the United States Supreme Court, and the courts of numerous States of the Union. We will cite a few of such cases, and quote brief excerpts from such authorities on the point. In the case of Strahm vs. Fraser, (Cal.) 163 Pac. 680, the footnote states the holding of the Court as:

"It is well settled that the identity of a corporation is not destroyed, nor are its legal obligations obliterated, by the mere fact of reincorporation under the same or a different name. '."

In the case of People vs. Payn (N.Y.) 55 N.E. 849, the Court said such reincorporation is permissible:

"* * * where (1) a company takes advantage of a statute permitting a corporation organized under a former statute to reincorporate under a statute superseding it. * * * ."

In the case of McCann vs. Children's Home Soc., (Cal.) 168 Pac. 355, the footnote citation states the case as holding in effect:

"Where, on ascertaining that the incorporation of a society was defective it was reincorporated, it was held that the two organizations were identical, and that the new corporation was a continuance of the former de facto corporation."

The question submitted in paragraph 4 of your letter is the following:

"The question also arises as to what disposition is to be made of the surplus in the expense and mortuary funds, and the rights of the various policyholders thereto, both those who go with the new corporation and those who elect to keep their old policies. And further, the problem of how to value the new outstanding insurance contracts, of rewriting all such contracts and the procedure to follow in case additional assessments are made seems important in this general picture for solution."

We believe Article X of the proposed by-laws of Capital Reserve Life Insurance Company, heretofore discussed answers this question with respect to what disposition is to be made of the surplus in the expense and mortuary funds and the rights of the policyholders thereto, both those who go with the new corporation and those who elect to keep their old policies. Said Article X of said proposed by-laws states: "the funds accumulated by the company while doing business on the assessment plan shall be administered to the interest and for the benefit of the remaining assessment members; provided, that any assessment member who chooses to cancel his assessment policy and take out in lieu thereof a policy on the stipulated premium plan issued to him by the Capital Reserve Life Insurance Company, shall receive his equitable share of the funds in the form of part payment on the premium (or premiums) on such stipulated premium policy."

The consideration of the remaining part of the question now being considered, to-wit: "And further, the problem of how to value the new outstanding insurance contracts, of rewriting all such contracts and the procedure to follow in case additional assessments are made seems important in this general picture

for solution", partakes, we think, of the carrying on of the internal business of the reincorporated company. This, we believe, is not a proper question for discussion or consideration in the matter of determining whether Capital Mutual Association has the right to reincorporate as Capital Reserve Life Insurance Company, or whether the proceedings now being considered result at all events in the incorporation of a new company. It will be noted that in the scheme and plan set up in Sections 5886 and 5894 for the reincorporation of a previously organized company into an Article IV company, it is not required that any statement be made as to the details of their plans for carrying on the corporate business. On this principle of law, 14 C.J. 140, states the following text:

"It is sometimes required that the articles, certificate, or charter shall state the manner of carrying on or conducting the business of the corporation, or contain other provisions as to its management, and a substantial compliance with such a requirement is necessary. But such a statement is not necessary unless required by the statute, nor, as a rule, is it either necessary or proper to state details as to the internal management of the corporation."

14A C.J., page 81, on this principle states the following text:

"A board of directors or trustees is the governing body of the corporation. It is vested with the management of the ordinary corporate affairs.
* * * ."

It is believed that under the facts disclosed in this undertaking to reincorporate the Capital Mutual Association into a stipulated premium company, the question of the handling of its monies and the administration of its corporate affairs are duties to be observed and performed by the Board of Directors of the reincorporated company, including the question of additional assessments which might be necessary in the protection of the policies still remaining in existence under the assessment plan. The statutes of this State and the decisions of our Appellate Courts furnish proper rules of law and remedies upon which to proceed if an insurance company does not, in the management of its affairs, observe the statutes of this State. It cannot be anticipated that they will disobey and violate the statutes under which they are

organized and carry on their business, but if such violations should occur they must necessarily be dealt with after they have been committed.

The question submitted in paragraph 5 of your letter is: "In case this should be approved as an entirely new corporation, then it appears the question of acquiring the assets of the present association by a reinsurance agreement under Section 5859 would require some consideration."

We believe this question is disposed of in our previous discussion and views in this opinion to the effect that this is not a new corporation but a continuation of the Article III assessment company by amendment of its Articles of Agreement to operate as an Article IV stipulated premium company. However, since the question is submitted we shall consider and discuss it.

Section 5859 of Article III, Chapter 37, R.S. Mo. 1939, to which our attention is directed in your letter, deals with the question of reinsuring or the transfer of risks. This Section, in part, is as follows:

"No corporation of this state, organized or doing business under the provisions of this article, shall transfer its risks to or reinsure them in any other corporation, unless the contract of transfer or reinsurance is first submitted to and approved by a two-thirds vote of a meeting of the insured, called to consider the same, of which meeting a written or printed notice shall be mailed to each policy or certificate holder, at least ten days before the day fixed for said meeting; * * * ."

It is manifest that the proceedings we are considering is neither an effort upon the part of a corporation to reinsure or to transfer risks held by the company to any other corporation.

Neither the proceedings incident to the reincorporation of Capital Mutual Association, nor Article X of the proposed by-laws of the Capital Reserve Life Insurance Company in any way indicate that there is any intention to transfer or to reinsure the assessment policies issued by Capital Mutual Association in another company. Those policies remain, as these proceedings declare, obligations of Capital Mutual Association. Capital Reserve Life Insurance

Company does guarantee that it will administer the monies and affairs of the reincorporated company to the benefit and preservation of the rights and the payment of the policies when due, of all members of Capital Mutual Association, and that if such members choose to take out policies in the reincorporated company they may do so, and will be given credit as and for premiums on such new policies for their proportionate share of the funds of the former company. There is a definite distinction between the reincorporation of a company into another company whereby the contracts and policies of the original company are to be preserved intact and fully carried out by the reincorporated company and the act of transferring or reinsuring such policies in another corporation. Reinsurance by one company of its insureds in another company is permitted in numerous lines of insurance by the statutes of this State. Among such statutes are Sections 5969 and 5927, and other sections which may be read as information on the subject. Article IV, Chapter 37, R.S. Mo. 1939, nowhere treats of or makes any provision respecting reinsurance of any insureds under that line of insurance.

Reinsurance has a definite place in the business of insurance and is an often used privilege of insurance companies under statutes to reinsure their insureds in another company for added safety to them as a detail of carrying on the business of insurance. 33 C.J. page 44, on this subject, and as a definition of "reinsurance" states the following text:

"* * * It is a contract whereby one party, called the 'reinsurer,' in consideration of a premium paid to him, agrees to indemnify the other party, called the 'reinsured,' against the risk insured by the latter by a policy in favor of a third person; the contract that one insurer makes with another to protect the first from a risk that he has already assumed; a new contract by which an insurer contracts for its own protection against liability in whole or in part for losses which it may suffer under risks which it continues to carry. * * * ."

We are convinced, therefore, by the matters of fact before us and by the authorities, including our statutes above cited and considered, that the question of the right or necessity of the insured members to participate in or vote upon the question of reincorporation of an Article III company into an Article IV stipulated premium company, has no part in the problem of the reincorporation of Capital Mutual Association on the theory of "reinsurance" is involved in the matter. Such reincorporation does not

constitute reinsurance.

In paragraph 2 of your letter you request our opinion upon whether the proceedings of Capital Mutual Association, an assessment company, to reincorporate as a stipulated premium company under the corporate name of Capital Reserve Life Insurance Company, is in conflict with the Constitution of the State of Missouri or of the Constitution of the United States. Our opinion is that these proceedings are in accordance with the statutes of this State, and that they do not contravene the provisions of the Constitution of Missouri or of the Constitution of the United States.

The regulation and supervision of the business of insurance is the exercise by statute of the police power of the several States. The States have this power and in the exercise of it they may define the terms upon which the business of insurance may be carried on. 12 C.J. 910, on this principle of law states the following text:

"Under the American constitutional system, the police power, being an attribute of sovereignty inherent in the original states, and not delegated by the federal constitution to the United States, remains with the individual states. * * * ."

This principle of law has been recognized and approved by our Supreme Court in numerous cases. One case is *State ex rel. vs. Vandiver*, 222 Mo. 206, where the Court, l.c. 223, said:

"Enactments of the Legislature providing for the control and management of corporations doing business in this State for the protection and well-being of its citizens, and licenses issued in pursuance thereof to such corporations to do business herein, are in no sense of the term contracts between the State and the corporations to which they are issued, but are police regulations, which may be amended or repealed by the Legislature at pleasure; and those claiming under such acts have no right to complain and are remediless in the premises."

These authorities then, we believe, permit us to say that these proceedings meet the requirements of the statutes of this State, the Constitution of this State, and the Constitution of the United States.

CONCLUSION

It is, therefore, the opinion of this Department:

1) That a domestic life or accident insurance corporation may, under the terms of Sections 5886 and 5894, Article IV, Chapter 37, R.S. Mo. 1939, reincorporate to carry on the business of insurance on the stipulated premium plan.

2) That under the procedure of reincorporation the reincorporation must, under Section 5886, be effected by the vote of a majority of the Board of Directors or Trustees of the company seeking to be reincorporated, and that the members of such corporation seeking reincorporation, in event such company would be an assessment company organized and existing under Article III, Chapter 37, R.S. Mo. 1939, would not have any duty to perform or privilege to exercise in effecting such reincorporation.

3) That questions of the preservation and disposition of surplus funds, expense and mortuary funds and the rights of various policyholders of both the former and the reincorporated companies, the method of valuing of new insurance contracts, the rewriting of contracts in the former company, and the procedure to be followed in case additional assessments become necessary and are made, belong to and are among the duties to be observed and performed by the Board of Directors in prosecuting the internal business affairs of the reincorporated company. These matters are not proper subjects to be defined or required in the Articles of Agreement or incorporation of the reincorporated company incident to procuring a certificate to do business from the Superintendent of the Division of Insurance.

4) That the proceedings submitted in this instance whereby Capital Mutual Association, a mutual insurance company organized and existing under the provisions of Article III, Chapter 37, R.S. Mo. 1939, are effecting a reincorporation to become a company doing business on the stipulated premium plan under the terms of Article IV, Chapter 37, R.S. Mo. 1939, comply with the statutes of this State in such cases made and provided and that such proceedings are not inconsistent with the Constitution of the State of Missouri or the Constitution of the United States.

Respectfully submitted,

APPROVED:

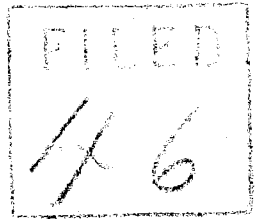
J. E. TAYLOR
Attorney General

GEORGE W. CHOWLEY
Assistant Attorney General

GWC:ir

APPROPRIATION : Compensation of member of the Public Hearing Panel, under House Bill No. 180, should be paid out of the appropriation of the State Board of Mediation.

January 2, 1948



Honorable Vance Julian, Chairman
State Board of Mediation
State Office Building
Jefferson City, Missouri

Dear Mr. Julian:

This is in reply to your request for an opinion, reading as follows:

"The State Board of Mediation, which operates under house bill No. 180, effective September 10, 1947, has requested an official opinion from the Attorney General to the following question:

"Can the State Board of Mediation lawfully compel the utility and the employees to pay the cost of the public hearing panel members, where compulsory arbitration has been ordered by the Board, as set out in Section 14, 15, 16, 17 and 18 of the Act?

"I wish to call your attention to the appropriation for the State Board of Mediation, Section 9.330, page 177 which includes the following language: '... and other necessary expenses of the State Board of Mediation, including the per diem and necessary expenses of especially appointed panel members as provided by law.' I do not find in the Act the directive that we should pay the special panel members per diem and expenses; therefore, before doing so, would like to have the opinion of your department as to our authority to pay the special panel members out of state funds, or whether

we should require the particular utility and union to stand the cost of the special panel of arbitration."

Under the terms of House Bill No. 180 the State Board of Mediation has been given the duty to attempt to peaceably settle disputes between employees and public utilities in furtherance of the declared public policy of the state to protect the interests of the people in these vital matters. In the event that the issues cannot be determined between the parties to the disputes, it is the duty of the State Board of Mediation, in the event that either the utility or the employees do not designate members of a Public Hearing Panel to arbitrate the issues, to make such designations for the disputants.

Inasmuch as there is no specific mention in the act that the state should bear the expenses of the Public Hearing Panel, we must look to see if the authority to pay may be reached by implication. In the case of *State v. Hackmann*, 217 S.W. 271, the Board of Equalization had hired an employee to help the Board carry out its duties, and the Court, in passing on the right of the employee to compensation, had this to say about the power of the Board of Equalization to hire employees, *l.c.* 273:

" * * * The general power granted by the statute, by a familiar rule of construction, carries with it the power to do all such things as are necessary to give effect to the principal power, and this is true even under the rule of strict construction applicable to section 18, art. 10, of the Constitution, *supra*.

"The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end." Story, J., in *Prigg v. Pennsylvania*, 13 Pet. 539, *loc. cit.* 619 (10 L. Ed. 1060).

"Thatsoever the law will imply is as much part and parcel of a legislative enactment as though in terms inserted therein." *State ex rel. v. Mason*, 155 Mo. 486, *loc. cit.* 500, 55 S.W. 636, 640; *State ex rel. v. Blair*, 245 Mo. 680, *loc. cit.* 697, 151 S.W. 148.

"In the exercise of this power the board employed relator and we have as we think shown that the work done by him was necessary in order to enable the board properly to discharge its duties. The board obviously thought it was, and, as will be shown later, the Legislature must be presumed to have so found."

Since the Board has been given the duty to enforce compulsory arbitration as provided in the act, we think that the necessary powers to perform this duty can be implied, including the payment of the arbitrators and the cost of the arbitration proceedings.

Under a general rule of construction, the acts of the Legislature are not to be construed so as to be meaningless, but should be construed to effectuate the purposes for which the act was passed. If it were to be held that the Board of Mediation is powerless to pay the expenses and compensate for the services of the arbitrators, a result may be reached where the Board would be unable to secure arbitrators and they would be powerless to carry out the duties imposed upon them by House Bill No. 180.

Where two acts are passed on the same subject matter at the same session of the Legislature, they must be construed together (Curtwright v. Crow, '44 Mo. App. 563).

In House Bill No. 445, an appropriation bill passed by the 64th General Assembly, the Legislature provided for the expenses of the Board of Mediation and, we believe, showed a legislative intent that the panel members should be paid out of the appropriation for the Board of Mediation. Section 9.330 reads:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Fifty Thousand Dollars (\$50,000.00) or so much thereof as may be necessary for the purpose of paying the salaries, wages and per diem of the members, employees and clerical hire and other necessary expenses of the State Board of Mediation including the per diem and necessary expenses of specially appointed panel members, as provided by law, for the period beginning

July 1, 1947, and ending June 30, 1948."
(Underscoring ours.)

The general purpose and object of a statute is never to be overlooked in its constructional application, and it should always have a reasonable application. Statutes in pari materia are to be treated as embodied in one section and considered together, in order to elucidate the legislative intent in their enactment, though they are found in different sections of the Revised Statutes under different headings (State v. Wbbs, 89 No. App. 95).

Furthermore, we do not believe that there would be a different situation where the disputing parties selected the panel members as provided in the act instead of waiting for them to be appointed by the State Board of Mediation. To hold that to be the law, again an absurdity might result from the practical application of the act. If it were held in one instance that the panel members might be paid for their services and recover expenses merely because they were appointed by the State Board of Mediation and not designated by the disputing parties, it is easy to see that the disputants would, in all probability, delay their designation of arbitrators and allow the Board to appoint the members of the panel.

Conclusion.

It is the opinion of this department that it was the legislative intent that the expenses and compensation of the members of the Public Hearing Panel appointed pursuant to the provisions of House Bill No. 180 should be paid out of the appropriation of the State Board of Mediation provided for in Section 9.330 of House Bill No. 445, passed by the 64th General Assembly.

Respectfully submitted,

JOHN R. BARTY
Assistant Attorney General

APPROVED:

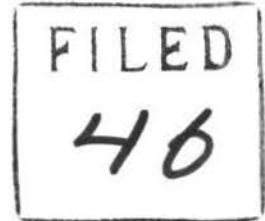
J. E. TAYLOR
Attorney General

JHB:ml

BARBER BOARD:

Person attending approved out-state school entitled to receive credit for education in applying for license to barber.

January 13, 1948



Mr. J. E. Johnston, President
State Board of Barber Examiners
No. 1 West Linwood Boulevard
Kansas City 2, Missouri

Dear Mr. Johnston:

This letter is in reply to your request for an opinion of this department, which request is as follows:

"There is a difference of opinion of members of the Barber Board concerning apprentices and I would like an opinion from your office. The facts are as follows:

"On June 30, 1947 the board unanimously agreed that an apprentice must get his whole training under the supervision of this board, on November 14, 1947 this board had an opinion from your office upholding this action. Prior to this ruling the board has recognized certain schools in other states that have lived up to the standards of our laws, but since the war have disregarded practically all of our laws in regard to apprentic training. Other schools have never been recognized by this board because they have never come up to our standards. We have a school operating in this state owned by the same Company that operated this formally accredited school that started to disregard our laws, rules and regulations the same as they have done in other places. The board stopped issuing permits to this school until such time as it had complied with the law, which it did over a year and a half ago. Some members of the board believe that we should recognize students that entered these formally accredited schools prior to the date of this ruling of June 30 although they have not lived up to our standards at any time this past year.

Mr. J. E. Johnston

"It is my opinion that these schools should not be shown any more preference than any other school not accredited by us from the time they quit living up to the standards of our laws, rules and regulations, which would be prior to January 1, 1947. And it would not be just to make a school that is operating in our own state live up to a certain standard and let a school in another state operated by the same Company be given permission to disregard our law by giving credit to an apprentice that go to these out of state schools that come under no supervision whatsoever of this board."

Section 10133, R.S. Mo. 1939, reenacted Laws of 1947, page 219, sets out the education and training required of applicants for a barber's license. The applicant is required to have:

"* * * either studied the trade for two years as a registered apprentice, under a qualified and practicing barber, or studied the trade for at least 1000 hours over a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor, who is licensed as such by the State Barber Board of Missouri; and an additional eighteen months as a registered apprentice under a qualified and practicing barber, or practiced the trade in another state for at least two years * * * * *

Provided, that whenever it appears that an applicant has acquired his knowledge of said trade in a barber school or college, the board shall be judges of whether said barber school or college is properly appointed and conducted and under proper instructions to give sufficient training in said trade. * * * * "

Section 10314, R.S. Mo. 1939, reenacted Laws of 1947, page 220, contains the following provision:

"* * * all barbers, or barber schools or colleges, who shall take an apprentice or student, shall immediately file with said board the name and age of each of such apprentices or students, and the said board shall cause the same to be entered in a register kept for that purpose; for which registration a fee of five dollars shall be paid to the treasurer of the

Mr. J. E. Johnston

board by such apprentice or student: Pro-
vided, that any firm, corporation or person,
desiring to conduct a barber school or col-
lege in this state, shall first secure from
said board a permit to do so, and shall keep
the same prominently displayed. For such per-
mit there shall be paid an annual fee of one
hundred dollars to be paid on or before June
30 of each year: Provided further, that said
board shall have the right to pass upon the
qualifications, appointments, and course of
study in said college or barber shops where
apprentices are taught the occupation of bar-
bering; and provided further, that said board
shall have the right and power to revoke the
certificate, permit or license of any such
barber school or college, instructor or teach-
er therein or instructor in any barber shop,
for any violation of the provisions of this
section."

Prior to June 30, 1947, the Board had approved certain bar-
ber schools located outside of the State of Missouri and had per-
mitted applicants for licenses to fulfill the educational require-
ments by attending such schools. On that date, the Board adopted
a rule requiring all educational training to be obtained within
the State of Missouri, and such rule was approved by an opinion of
this department dated November 17, 1947. Now some persons, who had
attended prior to June 30, 1947, the schools which the Board had
approved outside of Missouri, are seeking to receive credit for such
education. In view of the fact that the Board had approved such
schools during the time which the applicants attended them, now to
deny them credit for such training would be most unfair. They acted
in reliance upon the Board's action in approving such schools, and
should not now be penalized because of the subsequent change in the
Board's rules.

To make the rule adopted on June 30, 1947, applicable to per-
sons who had attended approved schools prior to that time would
give retrospective effect to the rule. Section 13, Article I,
Missouri Constitution of 1945, prohibits the enactment of any law
which is retrospective in its operation. That prohibition is ap-
plicable to rules and regulations adopted by an administrative
agency or board. State ex rel. Spriggs v. Robinson, 253 Mo. 271,
161 S.W. 1169.

You state in your letter that since the war some of the out-
state schools that your Board had formerly approved had failed
completely to live up to the Board's standards. Under such cir-
cumstances, the proper procedure would have been to revoke the

Mr. J. E. Johnston

permits of such schools under Section 10134, R.S. Mo. 1939. Having failed to do so, we do not feel that the students who attended such schools in reliance upon your recognition should now be made to suffer.

CONCLUSION

This department is of the opinion that a person who attended a school located outside of the State of Missouri, which had been approved, during the time of his attendance, by the State Board of Barber Examiners, is entitled to receive credit for such education under Section 10133, R.S. Mo. 1939, in applying for a license as a barber.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

BOARD OF MEDIATION:

Board of Mediation has no jurisdiction in labor disputes between municipally owned public utilities and their employees.

January 14, 1948

FILED

46

State ex. Moore
Julian
222 Ave 2nd 720

Honorable Vance Julian, Chairman
State Board of Mediation
State Office Building
Jefferson City, Missouri

Dear Mr. Julian:

This is in reply to your request for an opinion, which reads, in part, as follows:

"The State Board of Mediation has recently received a request from the International Brotherhood of Electrical Workers for the Board to take jurisdiction of a labor dispute between the City of Kirkwood, Missouri and the employees of the City, who work in the electric system supplying power and light within the city limits. A copy of Mr. Jacobs' letter is enclosed.

"The State Board of Mediation, before assuming jurisdiction of this matter, respectfully requests the opinion of the Attorney General as to our jurisdiction of this dispute, * * * *"

In House Bill No. 180, passed by the 64th General Assembly, it seems that it was apparently the intention of the Legislature that the State Board of Mediation should intervene in labor disputes affecting public utilities, even those under governmental ownership and control. However, the Supreme Court of Missouri, en banc, in the recent case of City of Springfield vs. Harry Clouse, et al., ruled that the employees of a city could not organize into unions for the purpose of collective bargaining:

"Under our form of government, public office or employment never has been and

cannot become a matter of bargaining and contract. (State ex rel. Rothrum v. Darby, 345 Mo. 1002, 137 S.W. (2d) 532; see also Nutter v. City of Santa Monica (Cal.) 168 Pac. (2d) 741, 1.c. 745; Miami Water Works Local v. City of Miami (Fla) 26 So. (2d) 194, 1.c. 197; Mugford v. Mayor and City Council of Baltimore (Md.) 44 Atl. (2d) 745, 1.c. 747.) This is true because the whole matter of qualifications, tenure, compensation and working conditions for any public service, involves the exercise of legislative powers. Except to the extent that all the people have themselves settled any of these matters by writing them into the Constitution, they must be determined by their chosen representatives who constitute the legislative body. It is a familiar principal of constitutional law that the legislature cannot delegate its legislative powers and any attempted delegation thereof is void. (11 Am. Jur. 921, Sec. 214; 16 C.J.S. 337, Sec. 133; A.L.A. Schecter Poultry Co. v. U. S., 295 U.S. 495, 55 S. Ct. 837, 79 L. Ed. 1570.) If such powers cannot be delegated, they surely cannot be bargained or contracted away; and certainly not by any administrative or executive officers who cannot have any legislative powers. Although executive and administrative officers may be vested with a certain amount of discretion and may be authorized to act or make regulations in accordance with certain fixed standards, nevertheless the matter of making such standards involves the exercise of legislative powers. Thus qualifications, tenure, compensation and working conditions of public officers and employees are wholly matters of lawmaking and cannot be the subject of bargaining or contract. Such bargaining could only be usurpation of legislative powers by executive officers; and, of course, no legislature could bind itself or its successor to make or continue any legislative act. Therefore, this section can only be construed to apply to employees in private industry where

actual bargaining may be used from which valid contracts concerning terms and conditions of work may be made. It cannot apply to public employment where it could amount to no more than giving expression to desires for the lawmaker's consideration and guidance. For these fundamental reasons, our conclusion is that Section 29 cannot reasonably be construed as conferring any collective bargaining rights upon public officers or employees in their relations with state or municipal government."

The above case is somewhat similar to the factual situation existing in Kirkwood in the present dispute inasmuch as some of the employees in Springfield were employed under the corporate or proprietary functions of the city. The court held that this did not change their ruling that city employees could not band together for purposes of collective bargaining. In this connection the court said:

"Nor can there be any difference with regard to employees of the City in connection with its corporate or proprietary capacity. Defendant's contention that there should be is inconsistent with their contention that the word 'employees' as used in Section 29 is all inclusive, covers all who could be classified as employees whether public or private, and cannot be limited to any class of employees. If this term is all inclusive so as to include any public employees, why would it not cover all such employees whether state, county or municipal, governmental or corporate? Moreover, some of the city employees involved herein are governmental. The proposed contracts covered all those in street work and some in sewage disposal plants. In protecting health and sanitation, even in keeping its streets clean and sanitary, a city is exercising governmental functions. (Lober v. Kansas City, (Mo.) 74 S.W. (2d) 815 and cases cited.) The distinction between proprietary and governmental functions is one created by

the courts mainly for the purpose of imposing some tort liability upon municipalities. (See 38 Am. Jur. 265, Sec. 573.) Nevertheless, 'a municipal corporation cannot be a private corporation in any true sense of the word, but remains, even in its dual capacity, essentially a public corporation.' (37 Am. Jur. 728, Sec. 114.) The question involved herein is a question of power rather than one of what function is involved. 'Missouri cities have and can exercise only such powers as are conferred by express or implied provisions of law; their charters being a grant and not a limitation of power, subject to strict construction, with doubtful powers resolved against the city.' (Taylor v. Dimmitt, 336 Mo. 330, 78 S.W. (2d) 841.) Fixing compensation, hours and tenure require the exercise of legislative powers in exactly the same way for all employees of the City, whether governmental or corporate, at least under the organization of second class cities in this state. We do not say that the General Assembly could not separate corporate functions, and employees engaged therein, and provide for their operation and management in some manner distinctly apart from other city functions (perhaps like the Tennessee Valley Authority under the federal government) so that employer and employee relations could be handled on a basis similar to private industry. However, it is clear that this has not been done in our cities of the second class."

The city of Kirkwood, Missouri, is a city of the third class, but we think that the reasoning applied in the Springfield case would also apply to cities of the third class. Section 6893, R.S. 1939, provides:

"The council shall have power to fix the compensation of all the officers and employees of the city; but the salary of

an officer shall not be changed during the time for which he was elected or appointed."

In Laws of Missouri, 1947, Volume 1, page 359, Section 2, the term "collective bargaining" is defined as follows:

"The term 'collective bargaining' shall be understood to embody the philosophy of bargaining by employees through representatives of their own choosing, and shall include the right of representatives of employees' units to be consulted and to bargain upon the exceptional as well as the routine wages, hours, rules, and working conditions."

We think it is clearly the intent of the Legislature that the State Board of Mediation should assist parties to labor disputes in public utilities to reach an agreement through collective bargaining. As unions are unable to bargain collectively with municipalities under the ruling in the Springfield case, we do not think that there remains any grounds for intervention or aid by the State Board of Mediation in these disputes.

Conclusion.

It is the opinion of this department that the State Board of Mediation has no jurisdiction of disputes between employees and public utilities under the control and ownership of municipal corporations inasmuch as employees may not band together in order to bargain collectively with municipalities.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

ELECTIONS: Clerks and judges of election and clerks employed
COMPENSATION: by the day by the Board of Election Commissioners
of St. Louis County are entitled to statutory
compensation for each calendar day actually
worked.

August 14, 1948



Honorabbe Dougals H. Jones
Counsel for St. Louis County Board
of Election Commissioners
325-331 Title Guaranty Building
St. Louis 1, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting
an official opinion of this department and reading as follows:

"The St. Louis County Board of Election Commissioners has requested me as counsel for the board to secure an opinion from your office, relative to the question of compensation to be paid clerks and judges of election, and clerks employed for the day by the Board of Election Commissioners.

"Section 11927 provides that judges and clerks, 'shall be allowed and paid at the rate of \$6.00 per day.'

"Section 11932, (laws of Missouri, 1947, page 284) provides that 'assistants and clerks employed by the day, by the Board of Election Commissioners shall receive a salary of \$7.00 per day.'

"The primary election just passed has caused great hardship and labor on the part of the clerks and judges and special clerks employed in St. Louis County. Most of them having been compelled to work 18 and 19 hours from the opening of the polls on Tuesday, August 3, until six or seven o'clock of Wednesday, August 4.

* * *

"Will you please be good enough to let us have your opinion as to whether the board will be justified in certifying these employees for two days pay, rather than one day as soon as practicable, and thereby oblige."

Section 11927, R. S. Mo. 1939, provides, in part, as follows:

"All judges and clerks of registration and election under this article shall be allowed and paid at the rate of \$6.00 per day. * * *"

Section 11932, Laws of Missouri, 1947, page 284, provides, in part, as follows:

"* * * Assistants and clerks not exceeding six (6) employed by the month by the board of election commissioners shall receive a salary of \$2,400.00 per year, and assistants and clerks employed by the day by the board of election commissioners shall receive a salary of \$7.00 per day, and the same shall be paid upon a certificate of the board that the services have been rendered. * * *"

In the case of *People ex rel. v. West Turin*, 59 N.Y. Sup. 234, the Supreme Court of New York, Onondaga County, held that the law fixing the number of hours which shall constitute a day's work does not have any reference to providing the number of hours that are to be worked to constitute a day's work as an election judge or clerk. We believe this rule to be applicable also in Missouri, since, by the very terms of the statutes regulating the time during which the polls shall be open, a number of hours greater than eight or nine is required.

In the case of *Early County v. Powell*, 20 S.E. 10, the Supreme Court of Georgia held that where an election clerk finished counting the calendar day after the day upon which the election was held, such clerk was entitled to two days' pay. The court's syllabus reads, in part, as follows:

"A special act providing for the compensation of managers and clerks of elections in a given county, which declares that these persons shall each receive for their services in holding elections two dollars per day, entitles them to the per diem mentioned, not only for the day

on which the voting is done, but for the next day, when their services are necessary in completing the count and making up the returns."

The St. Louis Court of Appeals, in the case of State v. Meagher, 124 Mo.App. 333, held that "election day," as used in a statute prohibiting a dramshop keeper from keeping his dramshop open on any general election day, meant the twenty-four hours beginning and terminating at midnight. Therefore, we believe that the "election day" ended at twelve o'clock midnight, August 3rd, and a new day commenced, within the meaning of Sections 11927 and 11932, supra.

We believe the reasoning of the Supreme Court of Georgia in the case of Early County v. Powell, supra, to be applicable here, and hold that where it was necessary, at the August primary, for clerks and judges to continue their election duties after midnight of the day of election, such clerks and judges are entitled to an additional day's pay at the rate provided in the statute.

CONCLUSION

It is the opinion of this department that the clerks and judges of election, and clerks employed by the day for the Board of Election Commissioners of St. Louis County, who actually performed election duties on the calendar day following the day upon which the primary election was held, are entitled to be compensated for their work on the day following such primary election, at the rate provided in Section 11927, R. S. Mo. 1939, and Section 11932, Laws of Missouri, 1947, page 284.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS: Deputy county clerk in fourth class county may also serve as county highway engineer.

November 19, 1948

FILED

46

11-22

Honorable John A. Johnson
Prosecuting Attorney
Reynolds County
Centerville, Missouri

Dear Sir:

This is in reply to your request for an opinion which reads as follows:

"Can a Deputy in the Office of the County Clerk in a County of the Fourth Class who is qualified to serve as County Highway Engineer be appointed to the position of County Highway Engineer in a County of the Fourth Class by the County Court and receive compensation for the services rendered as County Highway Engineer, provided the duties and hours of service in the two positions do not conflict in anyway?"

The general principle of law relating to whether a person may at the same time hold two public offices is found in Corpus Juris, Volume 46, page 941, et seq:

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time, provided there is no inconsistency in the functions of the two offices in question. But where the functions of two offices are inconsistent, they are regarded as incompatible. The inconsistency, which at common law makes offices incompatible, does not consist in the physical impossibility to discharge the duties of both offices, but lies rather in a conflict of interest, as where one is subordinate to the other and subject in some degree to the supervisory power of its incumbent, or where the incumbent of one of the offices has the power to remove the incumbent of the other or to audit the accounts of the other. The question of incompatibility does not arise when one of the positions is an office and the other is merely an employment."

The leading case in Missouri is *State ex rel. vs. Bus*, 135 Mo. 325, l.c. 338, wherein the court in discussing this question said:

"The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

"It was said by Judge Folger in *People ex rel. v. Green*, 58 N. Y. loc. cit. 304:

"Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law."

We have examined the statutes relevant to the duties of the county highway engineer and county clerk in counties of the fourth class, and we are of the opinion that the duties

Hon. John A. Johnson

-3-

are not incompatible and do not conflict so as to prevent the same person from acting as a deputy county clerk and also as county highway engineer.

CONCLUSION

Therefore, it is the opinion of this department that a deputy county clerk in a county of the fourth class may also serve as county highway engineer.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:VLM

10.
P.H.

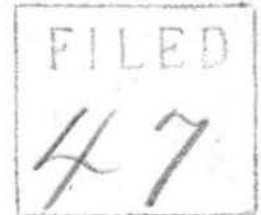
INHERITANCE TAX: When by reason of death of one co-owner of an estate by the entirety in either real or personal property, the survivor acquires the whole estate therein, the property is not subject to assessment of inheritance tax.

When by reason of the death of one co-owner of property, real or personal, held by two or more persons as joint tenants, acquires the interest of the deceased by reason of surviving, such property is not subject to assessment of inheritance tax.

January 21, 1948

Honorable O. A. Kamp
Judge of the Probate Court
Montgomery City, Missouri

2/5



Dear Sir:

We have your letter of November 7, 1947, in which you request an opinion of this department. Your letter is as follows:

"I would like to have your opinion in answer to the following questions:

"1. Should property, real estate, stocks and bonds, held jointly by husband and wife, as an estate by the entirety, be assessed against the survivor for Missouri Inheritance Tax?

"2. Should property, real estate, stocks and bonds, held jointly by two persons as joint tenants with right of survivorship and not as tenants in common, be appraised and assessed against the survivor for Missouri Inheritance Tax?

"I will thank you for an opinion from your office on these questions."

In case of an estate by the entirety in either real or personal property, the husband and wife constitute a legal entity, which entity owns the property involved as one person, and in case either of them dies, the survivor acquires the whole title, not by devise or inheritance under the intestate law, but by reason of the fact that even before the death of the co-tenant, the person, who afterwards turned out to be the survivor, owned the whole property subject only to the right, title and interest of the co-tenant, and that the extinguishment of that right, title and interest by the death of the co-tenant left the survivor as the owner of the whole property not subject to any other right, title or interest, or, in other words, left the survivor the sole owner.

We believe that this proposition is substantiated by the analysis of an estate by the entirety in the following quotation from *In Re Maguire's Estate*, 296 N.Y. Supp. 528, 1.c. 531:

"In an estate by the entirety the husband and wife are each seized of the entire estate, per tout et non per my. Each owns, not an undivided part, but the whole estate. The survivor, upon the death of the other, does not take a new acquisition, but holds under the original grant or devise, the estate being merely freed from participation by the other. There is no succession in or transfer of title." * * *

A further exposition of the character of an estate by the entirety is set forth in the following quotation from the opinion of the Supreme Court of Missouri in *Wimbush v. Danford*, 292 Mo. 588, 1.c. 606:

"The character of estate known as an estate by the entirety has long been firmly entrenched in the law of this State. * * * With the adoption of the common-law doctrine, there was necessarily adopted the attributes of the estate, viz: That neither the husband or wife was seized of moieties, but of entireties, each being the owner of the entire estate; that if either died, the estate continued in the survivor; and that upon the death of both, the heirs of the last surviving would take to the exclusion of the heirs of the first deceased. (Tiedeman on Real Property (3 Ed.), sec. 181.) In *Wilson v. Frost*, 186 Mo. 1.c. 319, VALLIANT, J., in speaking of this estate said: 'In an estate of the entirety, the husband and the wife during their joint lives each owns, not a part, or a separate or a separable interest, but the whole and, therefore, the death of one leaves the other still holding the whole title as before, with no one to share it.' * * *

In case of a joint tenancy involving two or more owners with a right of survivorship, the surviving owner, or owners, after the death of one of the owners, does not acquire under devise or under the intestate laws, but rather by virtue of the provisions of the original instrument which created the joint tenancy.

Section 571, Mo. R.S.A., limits the assessment of the inheritance tax to property transferred by will or under the intestate laws, and to property transferred by deed, grant, bargain, sale or gift made by the grantor, vendor or donor in contemplation of death, or a grant intended to become effective only after the death of the grantor, and provides that "every transfer by deed, grant, bargain, sale or gift made within two years prior to the death of the grantor, vendor or donor, of a material part of his estate * * * shall be construed to have been made in contemplation of death * * *."

CONCLUSION

In view, therefore, of the specific provisions of the inheritance tax law above referred to and the above outlined characteristics of estates by the entirety and of joint tenancies, the enhancement of the estate of the survivor in property held either by the entirety or under a joint tenancy flowing from the termination of the estate of a co-tenant therein by reason of said co-tenant's death is not subject to an inheritance tax assessment, unless the facts are that the transaction bringing about the creation of the estate by the entirety or the joint tenancy involved the transfer by deed, grant, bargain, sale or gift of a material part of the estate of the grantor or donor without an adequate valuable consideration, which said deed, grant, bargain, sale or gift was accomplished within two years prior to the death of the grantor or donor, or unless, even if accomplished more than two years prior to the death of the grantor or donor so creating said estate by the entirety or joint tenancy, it is nevertheless apparent from the state of facts surrounding the transaction that the creator of said estate created it in contemplation of death and intended it as a method of distribution of his property after his death, under either of which circumstances, the right of the State of Missouri to assess and collect an inheritance tax against the property vested in the surviving tenant might be established.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON
Assistant Attorney General

J. E. TAYLOR
Attorney General

SMW:LR

PROBATE JUDGE: Lawyer must reside in county sixty days
MAGISTRATE: to qualify for the office of probate
judge and ex officio magistrate.

FILED

48

June 1, 1948

6-7
Honorable John H. Keith
Judge of the Probate Court
Iron County
Ironton, Missouri

Dear Judge Keith:

This is in reply to your letter of recent date requesting the opinion of this department on the following set of facts: In case a vacancy is created in the office of probate judge and ex officio magistrate, and no lawyer in the county will accept said office, is a lawyer who is a resident of another county qualified to hold said office by appointment of the Governor?

The consideration of this question must, of course, be directed to the office of probate judge as that is the fundamental office since the probate judge derives his authority as magistrate from his official capacity as probate judge. (See opinion to Honorable Walter A. Eggers, Judge of the Probate Court of Perry County, dated October 1, 1947.)

We believe that Section 3 of the Magistrate Law, Laws of Missouri, 1945, page 763, which requires each judge of the magistrate court to have been a resident of the county for at least nine months next preceding his election, is not applicable to the office of probate judge and ex officio magistrate.

Section 1988, R. S. Mo. 1939, setting up the requirement that a probate judge must have been a resident of the county in which he may be elected for one year next preceding his election, was repealed outright by an act of the 63rd General Assembly, found in the Laws of Missouri, 1945, page 815.

There being no statute directly pertaining to the qualifications of probate judges with regard to residence, we must look to the constitutional provision relating to the qualifications for that office. Article V, Section 25, provides, in part, that "Judges of probate and magistrate courts shall be

qualified voters of this state, and residents of the county." Clearly, then, said judges must be residents of the county in which they will serve. However, the question arises as to what length of residence in the county is sufficient to comply with said constitutional provision. The determination of this question must necessarily depend upon the clause requiring such judges to be qualified voters of this state. According to Section 11469, R. S. Mo. 1939, as amended, Laws of Missouri, 1943, page 555, implementing Article VIII, Section 2 of the Constitution, a citizen to be entitled to vote in all elections by the people must have resided in this state one year and the county, city or town sixty days immediately preceding the election at which he offers to vote. Thus, it appears that a sixty day residence in the county which will entitle a citizen to vote in that county is required to qualify him for said office with regard to residence.

As a practical matter, we will direct your attention to Article V, Section 6 of the Constitution, which authorizes the Supreme Court to make temporary transfers of judicial personnel from one court to another as the administration of justice requires. In view of this authority, it may be possible under these circumstances to effect a temporary transfer of a judge of an adjoining county to Iron County in order to handle the duties of the court in Iron County. In such a case where a probate judge and ex officio magistrate is temporarily transferred or assigned by the Supreme Court to serve as a judge of the probate court and magistrate of a county other than the one to which he is appointed or elected, said judge shall be reimbursed for his expenses in the amount of five cents a mile for each mile traveled in going from the place of his residence to and returning from the place where such probate or magistrate court is held and for his subsistence in the amount of ten dollars per day for each day so engaged. Such expenses shall be paid monthly from the Magistrate Fund upon the certification of the probate judge or magistrate so transferred or assigned (Senate Bill No. 294 of the 64th General Assembly, approved May 6, 1948).

Conclusion.

In view of the foregoing, it is the opinion of this department that where a vacancy is created in the office of probate

Honorable John H. Keith

-3-

judge and ex officio magistrate, and where no lawyer in the county will accept said office, a lawyer of another county is not qualified to accept said office by appointment of the Governor unless he has changed his residence and resided for sixty days in the county where the vacancy exists.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

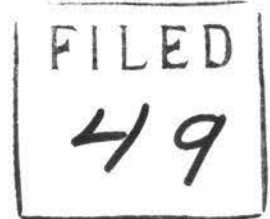
T.B.

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COUNTIES:)
FARM TO MARKET:
COUNTY BUDGET ACT:

The county court may anticipate the state aid for farm to market roads in its budget.

January 6, 1948



Mr. William H. Kimberlin
Legal Advisor
Buchanan County Court
St. Joseph, Missouri

Dear Mr. Kimberlin:

This is in reply to your request for an opinion from this office, which reads as follows:

"The County Court of this county has made the necessary arrangements, as required under House Bill No. 214, which created a County Aid Road Fund, to complete road projects during the year 1948, which will entitle this county to approximately \$26,000.00 to be paid by the State from that fund.

"The County advertised for bids under Section 5 of that bill and subsequently rejected all of the bids as too high and have since decided to complete the work, as county projects as authorized by that Section. Of course, upon completion of the work the State Auditor will forward a draft, drawn on the State Treasury to the treasurer of this county in the amount of approximately \$26,000.00 as above mentioned.

"Since there is a pressing need for road improvement in this county and those projects will be completed by June 1, 1948, the County Court is interested in making plans to spend this money on other road work after June 1948. This amount will be in excess of the anticipated revenue for 'Special Road and Bridge Fund' of this county for 1948,

Mr. William H. Kimberlin

and the County Auditor has questioned his authority to incur obligations against this money in 1948 under Section 10933 Laws 1945, page 609.

"As the intent of the Legislature to assist with construction of Farm to Market roads is involved, and thinking that your office has had this matter before them in like situations, we would appreciate your opinion on the two questions, to-wit:

"1. Does the County Court have authority under Section 10923 Laws, page 604 to anticipate income from the County Aid Road Fund Laws 1945 - Page 1471 for purposes of the County Budget for 1948 even though it is not due and payable until the work is completed by county employees and approved by the State Highway Commission?

"2. Is there any way that the County Court can legally spend the money referred to in the previous question during 1948 without it being included as on items of the Budget?"

The question which is involved in this request is one of first impression in this office. The applicable statutes are House Bill No. 214, passed by the 63rd General Assembly, Laws of Missouri, 1945, page 1471, the County Budget Law as amended by House Bill No. 834, found in Laws of Missouri, 1945, page 610, and Senate Bill No. 484, found in Laws of Missouri, 1945, page 603. Buchanan County is a county of the second class.

We believe that the County Court of Buchanan County is authorized to anticipate the income from an appropriation pursuant to the provisions of the County Aid Road Fund Law of 1945. You have stated in your letter that the County Court of Buchanan County has done all things required by the law providing for obtaining state aid to the counties in the construction and maintenance of farm to market roads. All that remains to be done before the county will receive the money anticipated by this law is that the work be finished and approved by the State Highway Commission. Of course, it must be assumed that the county will complete the work in accordance with the plans and specifications previously submitted to the State Highway Commission and approved by the Commission. In this connection, it should be pointed out that

Mr. William H. Kimberlin

the appropriation in furtherance of this bill expires on June 30, 1948, and in order to be certain that the county may receive this money the work should be completed and approved before June 30, 1948.

Section 10910, Mo. R.S.A., 1939, provides as follows:

"This law may be cited and quoted as the county budget law. All counties of the third and fourth classes shall be governed by Sections 10910 to 10917, inclusive, of this article. Whenever the term revenue is used in this article it shall be understood and taken to mean the ordinary or general revenue to be used for the current expenses of the county as is provided by this article regardless of the source from which derived. The county courts of the several counties of this state are hereby authorized, empowered and directed and it shall be their duty, at the regular February term of said court in every year, to prepare and enter of record and to file with the county treasurer and the state auditor a budget of estimated receipts and expenditures for the year beginning January 1, and ending December 31. The receipts shall show the cash balance on hand as of January first and not obligated, also all revenue collected and an estimate of all revenue to be collected, also all moneys received or estimated to be received during the current year. The clerk of the county court of the several counties of this state shall be the budget officer of such county and as such shall prepare all date, estimates and other information needed or required by the county court for the purpose of carrying out the provisions of this article but no failure on the part of the clerk of the county court shall in any way excuse the county court from the performance of any duty herein required to be performed by said court. The county court shall classify proposed expenditures according to the classification herein provided and priority of payments shall be adequately provided according to the said classification and such priority shall be sacredly preserved."

(Underscoring ours.)

Mr. William H. Kimberlin

Section 10923, Senate Bill No. 484, Laws of Missouri, 1945, page 604, provides, among other things:

"The annual budget of any such county shall present a complete financial plan for the ensuing budget year. It shall set forth all proposed expenditures for the administration, operation and maintenance of all offices, departments, commissions, courts and institutions; the actual or estimated operating deficits or surpluses from prior years; all interest and debt redemption charges during the year and expenditures for capital projects. In addition, the budget shall set forth in detail the anticipated income and other means of financing the proposed expenditures. * * *"

From a reading of Sections 10910 to 10923, above, it is our opinion that it was the intent of the Legislature, in providing for the County Budget Law, that anticipated income and revenue from whatever source should be included in the budget for the ensuing year.

Inasmuch as we have answered your first question in the above manner, we do not feel that it will be necessary at this time to answer your second question as the money to be received from the state, upon completion and approval of the road projects, may be included in the budget for 1948.

CONCLUSION

It is the opinion of this department that the County Court of Buchanan County may anticipate the income to be received from the state upon completion and approval of the work done, in compliance with House Bill No. 214, Laws of Missouri, 1945, page 1472.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Copy to J. Smith

COUNTY BUDGET: If counties of second class money collected by county collector in December and turned over to county treasurer in January of succeeding year may be carried forward in budget as "cash surplus." County treasurer is not authorized to set up separate cash fund from previous years and refuse to pay warrants of current fiscal year from such fund.

January 28, 1948

FILED

49

Honorable William H. Kimberlin
Legal Advisor
Buchanan County Court
St. Joseph, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading, in part, as follows:

"Over a period of several years this county has collected more than enough delinquent and non-delinquent taxes and revenues for the County General Revenue Fund to pay the outstanding warrants against that fund for each year.

"Due to the fact that there was no provision in the old Constitution for spending balances from previous years the County Court left this accumulation in the General Revenue Fund to save interest on loans which would have otherwise been necessary, and to enable the county to retire warrants for the fiscal year at an earlier date.

"This practice was followed during the year 1947, and at the end of the year there was not enough money in the hands of the County Treasurer to the credit of the General Revenue account to retire the warrants which were outstanding against that fund. However, during the month of December 1947, the County Collector collected more than enough money to be credited to the General Revenue Fund to retire these warrants, and he will deliver the December collections to the County Treasurer on January 15.

"With a view toward spending the difference between the income and expenses of previous years, the Court has requested an opinion from me as to whether they are authorized under Section 10927 of the Laws of Missouri, page 606, - to carry forward such figures as an item of 'Cash Surplus' in the budget for 1948 considering that this money was credited to the General Revenue account and used to retire 1947 warrants.

"The Court has also requested my opinion as to whether the County Treasurer is authorized to set up a separate cash fund of income from previous years and refuse to pay warrants of the fiscal year from that fund, with a view toward listing the amount of this fund as 'Cash Surplus' in the budget for the next year.

* * * * *

Section 10927, Laws of Missouri, 1945, page 606, provides, in part, as follows:

" * * * Any cash surplus at the end of any fiscal year shall be carried forward and merged with the revenues of the succeeding year. Payment of any legal unpaid obligations of any prior year, however, shall be a first charge in the budget against the revenues of the budget year: * * *"

Since the unpaid obligations of 1947 are a first charge in the budget for 1948, we believe that the revenues of 1947 which were not turned in to the county treasurer until 1948 do, as a matter of fact, constitute a "cash surplus" and should be considered as such in making out the budget for 1948 and added to the anticipated revenue for 1948 in determining the total amount of the budget. The fact that the money is credited to the general revenue account and used to retire 1947 warrants does not affect this since the budget must provide for the payment of such 1947 warrants.

Since the quoted portion of Section 10927, supra, provides that the cash surplus at the end of any year shall be carried forward and merged with the revenues of the succeeding year, the county treasurer is not authorized to set up a separate fund from the income from previous years and cannot refuse to pay warrants of the current fiscal year from such fund. The provision of

Section 10927 requiring that the surplus be merged with the general revenue contemplates that all payments for previous years shall be a part of the budget, and since the funds from previous years are merged with the revenues of the current year, no separate fund can be set up, but payments of warrants drawn on such fund should be made without regard to the source of the revenues which constitute such fund.

CONCLUSION

It is the opinion of this department that in counties of the second class the county court may carry forward as "cash surplus" money collected by the county collector in December but not paid to the county treasurer until the following January.

It is further the opinion of this department that the county treasurer may not set up a separate fund of income from previous years and refuse to pay warrants of the current fiscal year from such fund.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

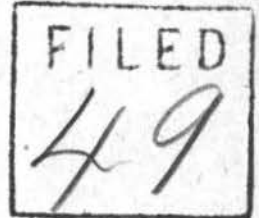
J. E. TAYLOR
Attorney General *C.B.*

CBB:HR

FURNITURE MANUFACTURERS MUST)
KEEP RECORD PROVIDED IN)
SECTION 4543:)

Furniture manufacturers who buy trees or parts of trees for manufacture into timber products are required to keep a record as provided in Section 4543, R.S. Mo. 1939 including the section, township, and range of the county from which such timber was cut and taken.

November 15, 1948



11-16
Honorable Milton S. Kirby
Assistant Prosecuting Attorney
Green County
Springfield, Missouri

Dear Mr. Kirby:

Your recent letter and enclosure requesting an opinion of this office with reference to Section 4543, R. S. Mo. 1939, reads as follows:

"Please render your opinion to this office on the enclosed paper which is self explanatory."

" A corporation purchases lumber from sawmill in order to manufacture the same into furniture. It retains the invoices showing the quantities purchased respectively from such sellers, but the suggestion has been made that this does not comply with the latter portion of Section 4543, R. S. Mo. 1939, which provides that, 'Every . . . corporation engaged in buying any railroad ties, staves, stavebolts or other manufactured timber products or any trees or parts thereof for manufacture into timber products, shall keep a record of every purchase and said record shall be kept in a place where such property is delivered to the purchaser. Said record shall contain the name of the person or persons from whom such property was purchased, the amount thereof, the date of purchase and the legal description of the section, township and range of the county from which such timber was cut and taken, which information shall be obtained from the person, or persons selling such property and be kept open for public inspection during business hours, and any person, firm, partnership or corporation, failing so to do shall be guilty of a misdemeanor.'

Hon. Milton S. Kirby

Nov. 15, 48

"It has been suggested that the intent of the above is that it shall apply only to such persons as sawmill operators or any other persons buying timber, and that it is not intended to require a furniture manufacturer to do more than keep invoices showing from whom and in what amounts and on what dates and for what price sawed lumber has been purchased. The language of the Section, however, may be construed differently and for that reason the opinion of the Attorney General showing what construction officially has been placed upon this portion of the statute is desired."

The specific question asked in the above letter referring to said section has reference to the latter part of that section, which carries a misdemeanor penalty, and not to the first part which carries the felony penalty and, therefore, the first portion thereof, for the purpose of this opinion, will not be considered.

The latter part of said section on which this question is asked is as follows:

" * * * Every person, firm, partnership, or corporation engaged in buying any railroad ties, staves, stavebolts or other manufactured timber products or any trees or parts thereof for manufacture into timber products, shall keep a record of every such purchase and said record shall be kept in a place where such property is delivered to the purchaser. Said record shall contain the name of the person or persons from whom such property was purchased, the amount thereof, the date of purchase and the legal description of the section, township and range of the county from which such timber was cut and taken, which information shall be obtained from the person, or persons selling such property and be kept open for public inspection during business hours, and any person, firm, partnership or corporation, failing so to do shall be guilty of a misdemeanor." (Underscoring ours)

The pertinent part of this section is, "Every person, firm, partnership, or corporation engaged in buying * * * any

Hon. Milton S. Kirby

Nov. 15, 1948

trees or parts thereof for manufacture into timber products, shall keep a record of every such purchase and said record shall be kept in a place where such property is delivered to the purchaser." This section goes on to say what the record shall contain, that is, it shall contain, "The name of the person or persons from whom such property was purchased, the amount thereof, the date of purchase and the legal description of the section, township and range of the county from which such timber was cut and taken."

Apparently only one construction can be put on this section and that is, that the provisions thereof apply to everyone who comes within any one of the classifications stated in the beginning of the sentence of the second portion of this section and would apply to furniture manufacturers as well as to any other person, firm, partnership, or corporation who bought any trees or parts thereof for the purpose of manufacturing same into timber products.

CONCLUSION

Therefore, it is the opinion of this department that a furniture manufacturer who buys trees or parts thereof for manufacturing into timber products must keep the record provided in said section including the legal description of the section, township and range of the county from which said timber was cut and taken.

Respectfully submitted

GORDON P. WEIR
Assistant Attorney General

APPROVED:

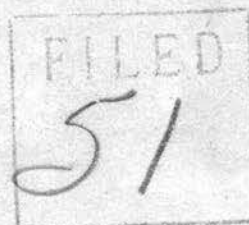
J. E. TAYLOR
ATTORNEY GENERAL

GPW:MA

Copy to Mr. John
SCHOOL DISTRICT
FUNDS:

Four questions, funds, transportation, distribution of funds, school board district liability.

Chair
February 10, 1948



Mr. Howard B. Lang, Jr.
Prosecuting Attorney
Columbia, Missouri

Dear Mr. Lang:

Your opinion request received by this office reads as follows:

"An opinion is requested from your office on the following facts:

"Conley School District in this county has voted the minimum levy of sixty-five cents for school purposes. On three other occasions the question of an increased levy has been voted down. The directors of the school district now are faced with the problem concerning both the common school and the transportation and tuition of high school children. The school district maintains its own common school and has contracted with a teacher for an eight-months' school. The funds now on hand and in sight will probably be sufficient to operate the common school, but will not provide anything at all for the transportation or tuition of high school children.

"The transportation setup for high school students is operating on a schedule approved by the Department of Education of this state in compliance with the new law, namely Section 10327, as amended by the last legislature. The amendment by the last legislature is as follows:

"Provided: any cost incurred for transporting such pupils in excess of \$3.00 per month for each pupil transported a distance of 2 miles or more may be collected from the district of the pupils residence, if said cost has been determined in the manner prescribed

by the State Board of Education.'

"The following questions are submitted:

"1. Should all available funds be used first and exhausted if necessary, in continuing the common school, without any contribution to the payment of tuition or transportation of high school students?

"2. What is the obligation of the district to transport and pay tuition of high school students where no funds are available and where the voters have refused a sufficient levy?

"3. Can protested warrants be issued by the directors, if they know at the time that funds are not available, to cover either operation of the common school or transportation and tuition for the high school students and what, if anything is the personal liability of the individual directors for such action if it is taken?

"4. If your opinion is that the high school tuition and transportation must be provided by the district, can the court fix a levy binding on the district to meet this obligation?"

I.

As we understand the facts your school district has and maintains an elementary school. Also, said school district has pupils seeking high school courses, but your district does not have and maintain a high school. Further, we understand that your school district has levied a tax of .65¢ per \$100.00 assessed valuation but refuses to levy at a higher rate. You have not stated the amount of the funds available, so we must turn to the statutes for our rules and analysis. Your first question reads:

"1. Should all available funds be used first, and exhausted if necessary, in continuing the common school, without any contribution to the payment of tuition or transportation of high school students?"

In order to answer your first question it is necessary for us to refer to parts of the Missouri Constitution for 1945, and the statutory provisions of Missouri. In the Constitution of Missouri, Art. IX, Section 1(a) provides that the General Assembly shall maintain free public schools. In part said section provides:

"Free Public Schools--Age Limit--Separate Schools.--A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law."

This provision of the Missouri Constitution has long been held to mean that the Legislature of Missouri was under a duty to create free schools in the State of Missouri, Roach v. Board etc., of St. Louis Pub. School, 7 Mo. App. 567. Many statutes have been passed by the Legislature of Missouri in the implementation of this Constitutional mandate, see Chapter 72, Articles 1-28, R. S. Mo. 1939, and Session Acts.

Under Section 10454, R. S. Mo. as amended, Laws of 1945, p. 1703, it is provided, in part:

"The board of directors of each and every school district in this state is hereby empowered and required to maintain the public school or schools of such district for a period of at least eight months in each school year.* * *"

Section 10456, Re-Enacted Laws of 1945, p. 1657, define how a teaching unit is classified. Let us assume that your school district is classified as a one unit elementary teaching unit. What then is the guarantee of the state as to financial assistance?

Section 10454, Laws of 1945, p. 1703, provides:

"* * *In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools thereof for such minimum term and to comply with the other requirements of this act, it is hereby provided that when any district has legally levied for school purposes (teacher's wages and

incidental expenses) a tax not less than twenty cents on each one hundred dollars of the assessed valuation of property therein, such districts shall be allotted out of the public school fund of the state an equalization quota to be determined by adding seven hundred and fifty dollars for each elementary teaching unit to which the district is entitled according to the provisions of Section 10456 of this law, one thousand dollars for each high school teaching unit to which the district is entitled according to the provisions of Section 10456 of this law, and the amount approved for resident transportation and then subtracting from the total, which total shall be known as the minimum guarantee of such district, the sum of the following items: The computed yield of a tax of twenty cents on each one hundred dollars (\$100.00) of the assessed valuation of the property of the district, the sum received the preceding year from the county and township school funds, and the sum estimated to be received for the current year for school purposes from the railroad, telegraph, utility and all other taxes based on assessments distributed by the state tax commission.

* * *

In applying that section to your problem it is apparent that your school district has been guaranteed \$750.00, "and the amount approved for resident transportation." From the total of those two items is subtracted the funds raised by the school district's levy of .65%, its school funds, taxes on railroads, telegraph, utility, and so on as outlined in said statute. In short, the state guarantees \$750.00 as a minimum fund for a one teaching unit elementary school district in the event such school district's levy and tax receipts fail to amount to \$750.00. The existence of this fund is by reason of the school district maintaining a one teaching unit, a fortiori, its use is limited to said one teaching unit, elementary common school. Had the required levy of .20% per \$100.00 assessed valuation plus the tax receipts, (or .65% levy as in your school district) amounted to more than \$750.00 an excess would have resulted, and we believe said excess could be used by the school district for any school purpose.

Briefly, the first \$750.00 raised by the provisions of section 10454, supra, is limited in its application to the elementary

school in your school district. If an excess had existed it could be used for any school purpose, if no excess exists then other provisions of the statute must be considered.

As to the pupils in your school district seeking high school facilities, and as your district maintains no high school, we must consider the following statutes.

Section 10458, Re-enacted Laws of 1945, page 1657, provides:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered; but the rate of tuition paid shall not exceed the per pupil cost of maintaining the school attended, less a deduction at the rate of fifty dollars for the entire term, which deduction shall be added to the equalization quota of the district maintaining the school attended, as calculated for the ensuing year, if said district is entitled to an equalization quota, if the district maintaining the school attended is not entitled to an equalization quota, then such deduction shall be added to the teacher quota of said district, as calculated for the ensuing year, but the attendance of such pupils shall not be counted in determining the teaching units of the school attended; and the cost of maintaining the school attended shall be defined as the amount spent for teachers' wages and incidental purposes. In case of any disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final. Subject to the limitations

of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil, or shall any school be denied the right to collect tuition from a pupil, parent, or guardian, if the same is not paid in full as hereinbefore provided. In no case, however, shall the amount collected from a pupil, parent or guardian exceed the difference between fifty dollars and the per pupil amount actually paid by the state, nor shall the amount the district of the pupil's residence is required to pay exceed the amount by which the per pupil cost of maintaining the school attended is greater than fifty dollars. If, for any year, the amount collected from a pupil, parent, or guardian exceed (exceeds) the difference between fifty dollars and the per pupil amount actually paid by the state, the excess shall be refunded as soon as the fact of an overcharge is ascertained.

This section expressly requires the "board of directors of each and every school district in this state" to pay the tuition of a pupil attending high school in another school district where the sending district does not maintain such facilities. Further, "nor shall any school be denied the right to collect tuition from a pupil, parent or guardian, if the same is not paid * * * as hereinbefore provided." The primary obligation is upon the board of directors, even though the pupil, parent or guardian is liable to the statutory extent also: see, Linn Consol. High School Dist. No. 1, vs. Pointer's Creek Public School District, No. 42, Sup. 203 S.W.(2d) 721.

Section 10327, Re-enacted Laws of 1947, page 494, provides:

"When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three (\$3.00) dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending and the method of transporting is approved by the state board of

education, the amount paid for transporting such pupils, not to exceed three dollars (\$3.00) per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. When the board of directors of a district that admits nonresident pupils to its high school makes provision for transporting such pupils to such high school, and the method of transporting and the transportation routes are approved by the state board of education before the transportation is begun the amount spent for transporting such pupils, not to exceed three (\$3.00) dollars per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no money apportioned to such district from any public fund or funds has been used to pay any part of the cost of transporting such pupils, except money apportioned to such district to pay the cost of transporting such pupils: Provided, any cost incurred for transporting such pupils in excess of three dollars (\$3.00) per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; and provided further, that for the transportation of pupils attending private schools, between the ages of six and twenty years, where no tuition shall be payable, the costs of transporting said pupils attending private school shall be paid as herein provided for the transportation of pupils to public schools."

The state aid guaranteed by sections 10327 and 10454, supra, relating to transportation costs are part of the minimum guarantee.

In summarizing the above statutes let us briefly review them.

The foregoing sections, namely 10454, 10458 and 10327, supra, are the basic guarantees to all persons not over twenty years of age who are resident of a common school district.

In order that each and every district may have the funds necessary to enable the board of directors to maintain the school or schools for the minimum term and to comply with the other re-

quirements of law the state provides certain aids to supplement the district's local funds.

Each school district in the state is entitled to participate in the distribution of the state school moneys. Section 10454, Laws of 1945, page 1703 prescribes the basis for calculating the amount of school moneys due each school district. Section 10456, Laws of 1945, page 1657 provides that a school district's apportionment guarantees shall be based on teaching units and lists the table for determining apportionment units.

A common school district in which a one teaching unit elementary school is maintained is entitled to a minimum guarantee of at least \$750.00 for school purposes because of such elementary school. Also the district is entitled to additional apportionments for each teaching unit according to the conditions stated in the law, when the state school fund is in excess of the amount required for minimum guarantees and other basic apportionments including tuition, transportation, and other special aids.

Section 10458, supra, provides that the board of directors of the pupil's home district shall pay the tuition cost, less the first \$50.00 which shall be paid by the state. The fifty dollars to be paid by the state is apportioned direct to the receiving district that maintains the high school. The additional cost may be paid by the home district and the board of directors has the authority to pay the tuition. The only restriction here is that no part of the minimum guarantee shall be used for paying tuition for pupils attending high school.

Section 10327, supra, provides that the state shall pay direct to the receiving high school the first \$3.00 of the cost of transporting such pupils when the high school provides the transportation facilities. The additional cost in excess of \$3.00 incurred for transporting non-resident high school pupils may be collected from the district of the pupil's residence as provided by law.

If the common school district maintains a high school then such district is entitled to a thousand dollars for each high school teaching unit which is also made a part of the minimum guarantee. If the school district does not maintain a high school then the district under Section 10458, supra, shall pay the tuition of each and every pupil resident who has completed the highest grade offered in the district who attends an approved high school in another district. This tuition paid by the district is less a deduction of \$50.00 per pupil which is paid by the state to the district which the high school pupils attend.

From the facts presented in your request it appears that the school district in question maintains an elementary school but does not maintain a high school and sends its high school pupils to high schools in other districts. Applying this situation to the law stated above the following procedure should be adopted by the school district.

- (1) The minimum guarantee received for each elementary teaching unit must be spent for the upkeep and education of the elementary pupils.
- (2) When high school pupils are sent to a high school in another district the state pays \$50.00 tuition per pupil and \$3.00 per month per pupil transportation cost which payment is made direct to the receiving district. The sending district is liable for the tuition and transportation costs in excess of these amounts.
- (3) If twenty (.20¢) cents or more is levied which brings in an amount in excess of the minimum guarantee provided for in Section 10456 then such excess may be spent for any school purpose including the costs of tuition and transportation of high school pupils.
- (4) If the district levies the maximum of sixty-five (.65¢) cents and the income is not sufficient to pay the expense of the district and the voters of the district refuse to authorize by vote a levy in excess of the sixty-five (.65¢) cents then the district is still bound to maintain its elementary school and send its high school students to another district. In carrying out this duty the district must follow strictly the requirements set out in paragraphs 1, 2 and 3 above.

II.

Your second question reads as follows:

"2. What is the obligation of the district to transport and pay tuition of high school students where no funds are available and where the voters have refused a sufficient levy?"

In analyzing your question the word "obligation" is to be considered.

Section 10458, Laws of Missouri, 1945, S.B. No. 308, page 1662, provides:

"The board of directors of each and every school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each and every pupil resident therein who has completed the work of the highest grade offered in the school or schools of said district and attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning where work of one or more higher grades is offered;* * *"

Therefore, it is apparent that it is mandatory upon the school district to furnish tuition (and transportation) in accordance with the above quoted statute. What exactly is meant by the part of your question which reads, "where no funds are available and where the voters have refused a sufficient levy" is not clear. In question one, above, it was pointed out that the transportation cost not in excess of three dollars is borne by the state, Section 10327, R. S. Mo. 1939, and that the cost in excess of three dollars may be collected from the district of the pupil's residence under the same section. There is no question as to the existence of the obligation of a school district to furnish tuition and transportation to pupils, your question conceals a concern as to where the funds are to come from. Keep in mind the conclusion of question one above as to

the minimum guarantee. Section 10327, S. B. #84, as passed by the 64th General Assembly, provides:

"When any school district makes provision for transporting any or all of the pupils of such district to a central school or schools within the district, and the method of transporting is approved by the state board of education the amount paid for transportation, not to exceed three (\$3.00) dollars per month for each pupil transported a distance of two miles or more, shall be a part of the minimum guarantee of such district for the ensuing year. When the board of directors of any school district makes provision for transporting the high school pupils whose tuition it is obligated to pay, to the school or schools they are attending, and the method of transporting is approved by the state board of education, the amount paid for transporting such pupils, not to exceed three dollars (\$3.00) per month for each pupil transported shall be a part of the state apportionment to such district for the ensuing year, if no part of the minimum guarantee of such district has been used to pay any part of the cost of transporting such pupils. * * * provided, any cost incurred for transporting such pupils in excess of three dollars (\$3.00) per month for each pupil transported may be collected from the district of the pupil's residence, if said cost has been determined in the manner prescribed by the state board of education; * * *"

The cost of any transportation in excess of three dollars "may be collected from the district of the pupil's residence."

Therefore, we see that under the statutes a school district must provide high school facilities and if it is necessary to transport the pupils in order that he receive such educational facilities the cost is borne by the state and the district in which the pupil resides. The correct solution for your problem would have been for the school district to levy a sufficient tax for this expenditure. However, the other possible solution would be for the transporting school district to seek a judgment against the district of the pupil's residence. That a suit will lie by one school district against another, see Missouri Digest

Vol. 25, Key 112-126. Further, that the Courts of this State will enforce the collection of a valid judgment, see State ex rel. Wood v. Hamilton, 136 S.W. (2d) 699, where the Springfield Court of Appeals held that mandamus was the proper remedy to require school district directors to recommend additional tax levy for payment of judgment against the district.

So in answer to your second question one sees that where there is, as there is in Missouri a statutory duty upon a school district to furnish high school facilities (Section 10458) and pupils do attend another high school, in lieu of one not being furnished by the district of the pupil's residence, the State will pay the cost of transportation not in excess of three dollars (Section 10327) which sum is over and above the minimum guarantee (Section 10454), the district transporting the pupil may collect the cost in excess of three dollars from the district of the pupil's residence (Section 10327) either from funds available or by suit and the collection of a judgment (Wood v. Hamilton, 136 S.W. (2d) 699). The fact that there are no funds available for transportation or the fact that the voters refuse to levy a sufficient tax for such transportation is no defense or relief from the duty to provide the required educational facilities.

III.

Your third question reads as follows:

"3. Can protested warrants be issued by the directors, if they know at the time that funds are not available, to cover either operation of the common school or transportation and tuition for the high school students and what, if anything, is the personal liability of the individual directors for such action if it is taken?"

The answer to this question is found in Section 10366, R.S. Mo. 1939, where it provides:

"* * * No warrant shall be drawn for the payment of any school district indebtedness unless there is sufficient money in the treasury and in the proper fund for the payment of said indebtedness * * *".

As to the personal liability of the directors of a school district should they issue a warrant with the knowledge that no

funds are available we again refer to Section 10366, 1943, page 893, and the interpretations given said statute in Missouri, annotated Statutes, vol. 21, p. 435. The first sentence of said section reads:

"All moneys arising from taxation shall be paid and only for the purposes for which they were levied and collected
* * *

The powers of the board of directors are limited to those listed in the statute; Conley School District No. 6 of Jackson City v. Shawhan, 273 S. W. 182, Mo. Digest, Vol. 25, key 55 to 63. School warrants can only be issued by the order of the board of directors; Miller v. Alsbaugh, 2 S. W. (2d) 208. In the case of Jacquemin & Shenker v. Andrews, 40 Mo. App. 507, l.c. 510, the Court of Appeals passed on a matter quite similar to the one presented in your third question, l.c. 510, Smith, P.J. wrote:

"* * *We may add that the government of the school district is vested in a board of directors, composed of three members. Their powers and duties are prescribed by statute. For the performance of these duties they receive no salary or compensation. It is a trust reposed in them, the execution of which is oftentimes attended with difficulty and embarrassment; and the question which we have to determine is, whether these officers are personally liable upon the facts stated in the petition, which stands admitted by the demurrer. The allegation is that they caused an order to be drawn on the county treasurer for teacher's wages, when they knew there was then no money in that fund. It is not alleged that there did not afterwards, during that school year, come into the teacher's fund moneys from the state, county or district, out of which said warrant could be paid, so that there was no provision made to meet it. We take it, that, while the board of directors were, by the implication of the statute, prohibited from drawing said warrant on the treasury, unless there was money on hand of that fund out of which it could

be paid, still this prohibition must not be construed so as to preclude the directors from anticipating this fund, if the amount of their warrant could subsequently be paid out of any money coming into the county treasury for that school year, from either or all of the three sources from which that fund, by law, is derived.

"The provisions of the school law must be construed liberally so as to give them a practical effect. * * *"

It should be kept in mind that the above quoted case did not hold the board of school directors liable for a warrant drawn against the proper fund, which fund had been exhausted. However, misapplication of funds is another question, see Consolidated School District No. 6 vs. Shawhan, 273 S. W. 184. Therefore, under the Andrews case, cited supra, if the school board orders a warrant drawn against a fund which they know is exhausted they are not personally liable as long as they cannot be proved to know that the funds may not come into existence. In other words the school board may issue warrants on anticipated funds, but the court did not pass upon the question of the director's liability for a warrant drawn against an exhausted fund where no revenue was anticipated. However, since the Andrews case held that the school directors were not liable personally for a warrant drawn against an exhausted fund, where there was no denial of any anticipated funds it might be concluded that under the Andrews case that if the school directors ordered a warrant drawn against an exhausted fund, fully knowing no funds existed and none were anticipated and in the face of the statute, section 10366, then the school directors would be personally liable for the warrant.

IV.

Your fourth and last question reads as follows:

"4. If your opinion is that the high school tuition and transportation must be provided by the district, can the court fix a levy binding on the district to meet this obligation?"

Under the statutes quoted supra, this office is of the opinion that tuition and transportation must be provided by the district of the pupil's residence. Whether or not "the court can fix a levy binding on the district to meet this obligation" turns upon several things. First, the route of transportation must be approved by the State Board of Education, Section 10327, R. S. Mo.

1939. Secondly, the transporting district must be unable to collect from the district of the pupil's residence. Further, a valid judgment must be obtained against the district of the pupil's residence, then under the case of State ex rel. Wood v. Hamilton, 136 S. W.(2d) 699, mandamus will lie to enforce the collection of an additional school levy for payment of the judgment against the district. At local citation 700, the court held:

"It is our conclusions that mandamus is the only available procedure to a judgment creditor, to enable him to collect a judgment under the facts presented here. This court recently held in the case of State ex rel. Hufft v. Knight et al., Mo. App. 121 S. W. (2d) 762, 764, that mandamus 'cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so results from the plain moral as well as the legal obligation of a municipality or district to pay its debt and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. * * *The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted to the directors. State ex rel. R. S. Funsten Co. v. Becker et al., Judges of St. Louis Court of Appeals, 318 Mo. 516, 1 S. W. (2d) 103; State ex rel. Kirkwood School District v. Herpel, Mo. App., 32 S.W.(2d) 96.'"

CONCLUSION

This department is of the following opinion:

A.

(1). The minimum guarantee received for each

elementary teaching unit must be spent for the upkeep and education of the elementary pupils.

- (2). When high school pupils are sent to a high school in another district the state pays \$50.00 tuition per pupil and \$3.00 per month per pupil transportation cost which payment is made direct to the receiving district. The sending district is liable for the tuition and transportation costs in excess of these amounts.
- (3). If twenty (.20¢) cents or more is levied which brings in an amount in excess of the minimum guarantee provided for in Section 10456 then such excess may be spent for any school purpose including the costs of tuition and transportation of high school pupils.
- (4). If the district levies the maximum of sixty-five (.65¢) cents and the income is not sufficient to pay the expense of the district and the voters of the district refuse to authorize by vote a levy in excess of the sixty-five (.65¢) cents then the district is still bound to maintain its elementary school and send its high school students to another district. In carrying out this duty the district must follow strictly the requirements set out in paragraphs 1, 2 and 3 above.

(B). As there is a statutory duty upon a school district to furnish school facilities (Sec. 10458) and pupils do attend another high school, the State will pay the cost of transportation not in excess of three (\$3.00) dollars which sum is over and above the minimum guarantee (Sec. 10454), and the district transporting the pupils may collect the cost in excess of three (\$3.00) dollars from the district of the pupil's residence.

(C). The directors of the school board may issue warrants on anticipated funds, but are personally liable for warrants drawn against funds where the directors have full knowledge the fund is exhausted and no funds are anticipated.

(D). If a proper judgment is obtained by one school district against another, mandamus will lie to enforce the collection of

Mr. Howard B. Lang, Jr.


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an additional levy for payment of the judgment if said levy is within the amount authorized by the Constitution, sixty-five (.65¢) cents.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

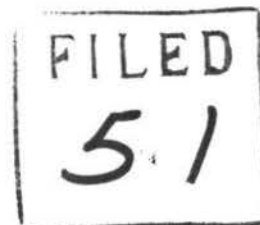
APPROVED:

J. E. TAYLOR 
Attorney General

WCB:mw

MAGISTRATES: Magistrate is not in violation of the nepotism
NEPOTISM: law by the county court appointing his sister
COUNTIES: to assist him under Section 21, page 241, Laws
of Missouri, 1947.

March 12, 1948



Honorable J. Harry Latham
Prosecuting Attorney
Andrew County
Savannah, Missouri

Dear Sir:

We are in receipt of your request for an official opinion
which reads:

"A', a county in Missouri, has a population
of 14,000. At the General Election 1946, B.
was duly elected as Probate Judge and Ex-of-
ficio Magistrate thereof. Since January 1,
1947, he has been duly qualified and acting
in such capacity.

"B. appointed his official clerk as provided
by law. In addition, he requested the County
Court of A. county to provide him with addi-
tional stenographic, clerical and secretarial
help, without designating in writing or of
record the name of the individual to be em-
ployed. The County Court of A. County entered
upon its records an entry purporting to em-
ploy C. to supply such service to Mr. B. C.
is the sister of B.

"May I have your opinion, based upon the above
facts, to the following two questions.

"1. Has B. violated the anti-nepotism provi-
sions and if so, to such an extent as to for-
feit the office.

"2. Is the County Court, clerk and treasurer
of A. county legally authorized, knowing C. to
be B's sister, to pay compensation to her for
work done in B's office."

Honorable J. Harry Latham

Section 6, Article VII of the Constitution of Missouri, 1945, supersedes Section 13, Article XIV of the Constitution of Missouri, 1875, and reads:

"Any public officer or employee in this state who by virtue of his office or employment names or appoints to public office or employment any relative within the fourth degree, by consanguinity or affinity, shall thereby forfeit his office or employment."

Section 21, page 241, Laws of Missouri, 1947, authorizes magistrates to appoint a clerk and as many deputies as necessary and fix their salaries. However, the amount fixed as salaries must not exceed that allowed for such services in the act under Section 22, page 775, Laws of Missouri, 1945. This provision further authorizes the county court, when the need exists, at the cost of the county to provide additional clerks, deputies and other employees who shall serve at the pleasure of the magistrate. Section 21, Laws of Missouri, 1947, reads in part as follows:

"In all counties each magistrate shall by an order duly made and entered of record appoint and fix the salary of a clerk of his court and may appoint such deputies and employees as may be necessary for the proper dispatch of the business of his court and fix their salaries at such sum as in his discretion may seem proper. The total salaries of clerk, deputies and other employees paid by the state shall in no event exceed the annual amount fixed in this act for clerk and deputy clerk hire of such courts, provided, that in any county where need exists, the county court is hereby authorized, at the cost of the county, to provide such additional clerks, deputy clerks or other employees as may be required and to provide funds for the payment of salaries or parts of salaries of clerks, deputy clerks and other employees, in addition to the amounts payable by the state under this act. All such clerks, deputies and employees shall serve at the pleasure of the magistrate. * * * "

In State vs. Becker, 81 S.W. (2d) 948, 1.c. 949, 950, a vacancy arose for a commissioner of the St. Louis Court of Appeals. The commissioner to be appointed was related within the fourth degree by consanguinity to one of the judges of said court, who

Honorable J. Harry Latham

normally would participate in the selection of a commissioner of said court. The judge related to the candidate for office of commissioner refused to participate in the selection of a commissioner, and did not in any manner by connivance attempt to influence the remaining members of the court in the selection of a commissioner. The court held that the two remaining members of the court could appoint as commissioner the candidate related within the fourth degree to the judge who refused to participate in the selection, since they constituted a majority of the court, and in so holding said:

"We are of the opinion that the reason of decision, as it appears in the quotation given, and as stated in the provision itself, does not support relator's position. The essence of the provision and likewise of said decision is the power of appointment vested in one and the successful exercise thereof by him in accomplishing the appointment of his relative. Action, direct or indirect, not inaction is prohibited. * * * "

CONCLUSION

Therefore, in view of the facts stated in your request and the foregoing decision, we are of the opinion that the magistrate, in this instance, has not violated the nepotism law of this state.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

OFFICERS:
UNIVERSITY:
PROFESSORS:

Professor who accepts royalty checks
for books used in the University
violates Section 10811.

April 9, 1948



Honorable Howard B. Lang, Jr.
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Lang:

This is in reply to your request for an opinion, which
reads as follows:

"Mr. A, a professor at the University of Missouri, writes a book using his knowledge, research, and experience in a technical field in the preparation of his manuscript. This book is turned over to a publisher, who publishes this book, either in book form, or in mimeographed pamphlet form, which is sold through the regular channel of retail book stores to students at the University of Missouri and in other universities where the sale of this book or pamphlet can be promoted. The publisher of the book pays to Mr. A, the professor, a regular publishers royalty, which is based on the number of copies of the book or pamphlet that are sold.

"Question: Is Mr. A violating the provisions of Section 10811 by accepting these royalty checks from the publisher?"

Section 10811, R.S. Mo. 1939, provides:

"If any member of the board of curators, president, professor, teacher or other officer or employee of the state university shall be directly or indirectly interested in any contract for furnishing

Honorable Howard B. Lang, Jr.

supplies for said university or any of the departments thereof, or in any work to be done upon any of the buildings of said university or repairing of the same, or ornamenting the grounds thereof or fencing the same, or if said curators, or any one of them, or the president or any professor, teacher or other officer or employee shall keep for sale or be interested in, directly or indirectly, the sale of any school furniture or apparatus, books, maps, charts or stationery used in said university or any department thereof, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction be fined not less than two hundred dollars or imprisoned in the county jail where said offense is committed not less than three months, or by both such fine and imprisonment." (Underscoring ours.)

Section 10811 is a penal statute and as such should be strictly construed. However, the rule of strict construction must not be followed if by doing so the scope and purpose of the act would be narrowed so as not to include cases which are obviously within its provisions. *Abbott v. Western Union Tel. Co.*, 210 S.W. 769. The first underscored part of Section 10811 follows very generally the language used in similar statutes prohibiting the personal interest of a public officer in a contract which is let by the group of which he is a member. The second underscored part of Section 10811 goes even farther than the provisions generally used in these public officer contracts. By the very words themselves it forbids interest, directly or indirectly, by the named officers or employees in the sale of miscellaneous articles used in the University or any of its departments.

We will assume for the purposes of this opinion that the professor used as an example in your request is not keeping for sale and is not directly interested in the sale of books in which he has a pecuniary interest. Therefore, if there is any violation of Section 10811 it must be because the professor is indirectly interested in the sale of books. We have been unable to find cases which are directly in point with the question, but we believe that the cases arising under the public officer contracts are similar in defining "indirectly interested."

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In the case of Stockton Plumbing & Supply Co. v. Wheeler, 229 Pac. 1020, the facts were that one Charlesworth was a member of the city council of the city of Stockton and at the same time was employed as a sheet metal foreman by the petitioner at the time the petitioner was awarded a contract for the doing of certain work. The court held that the personal interest of a public officer in a contract may be indirect only, still such interest would be contrary to public policy because "a public officer in the discharge of his duties as such should be absolutely free from any influence other than that which may directly grow out of the obligations that he owes to the public at large." (l.c. 1024)

In Yonkers Bus, Inc. v. Maltbie, et al., 23 N.Y.S. (2d) 87, at page 91, the court said:

"Interest, 'direct or indirect' in a contract may include an interest the fruition of which is postponed or implicit as well as one which is immediate and in stated terms."

In Witmer v. Nichols, 320 Mo. 665, 8 S.W. (2d) 63, the Supreme Court of Missouri had before it a case in which a member of the school board was held to be indirectly interested in a contract for the sale of land to the school board. Although the pecuniary gain to the board member was only indirect, mainly by virtue of a rise in value of land in which he was interested, the court said:

" * * * But on either theory of fact the transactions, in so far as the School District was involved, contravened public policy. Nichols as a member of the Board of Directors owed the School District an undivided loyalty in the transaction of its business and in the protection of its interest; this duty he could not properly discharge in a matter in which his own personal interests were involved. The principle is so well settled that we do not deem it necessary to cite authorities."

When the professor receives a royalty check for books used in the University, it is our opinion that following the general rules as exemplified in the preceding cases he does have at least an indirect interest in the sale of the books because of the pecuniary interest flowing to him in the form

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of royalty payments. We are further of the opinion that the provisions of this act contemplate books which are required to be used by the students in the regular classroom work, those which are listed as required outside reference and also those books which are suggested as supplementary or additional reading matter or reference in connection with the books which are actually listed by the University. This, for the reason that we believe the object intended to be accomplished by the statute was to obviate the possibility of the various named officers and employees of the University taking advantage of their position to promote by indirect means the use of such books. It should be noted that the opinion is limited in its application to the books used in the University of Missouri and has no reference to those used at other colleges or universities which may adopt the same.

While we take cognizance of the established practices of professors writing books to be used in connection with their class lectures, we must also recognize that the questions of the wisdom, practice, policy or expedience of a statute which might tend to discourage the practice of these writings are for the Legislature alone. We must accept the law as it is written.

CONCLUSION

Therefore, it is the opinion of this department that a professor at the University of Missouri who accepts royalty checks from a publisher for books used in the University or one of its departments violates the provisions of Section 10811, R.S. Mo. 1939.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

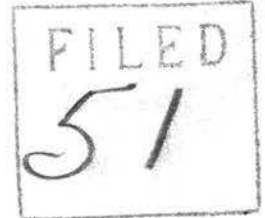
APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

INSURANCE: Personal property in the office of a farmers
TAXATION: mutual insurance company is taxable in this State.

April 16, 1948



4-20

Honorable Howard B. Lang, Jr.
Prosecuting Attorney
of Boone County
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your request
for an opinion, which reads, in part:

"The Assessor and Collector of this county would like an opinion as to whether or not a farmers mutual insurance company, organized under Article 15 of Chapter 37, R.S. Mo. 1939, is subject to the assessment and payment of personal property taxes. A company here in Columbia has refused to pay personal property taxes assessed on office furniture and other personal property, claiming that under the provisions of Section 6177 they 'are hereby exempted from the provisions of this chapter as applicable to general insurance companies'."

One of the established rules of statutory construction is that statutes authorizing a particular tax are construed against the taxing authorities. However, a tax exemption statute is to be construed strictly against one claiming exemption thereunder. See: American Bridge Co. vs. Smith, 179 S.W. (2d) 12, 352 Mo. 616.

The Constitution of Missouri, 1945, namely Section 6, Article X thereof, prescribes what property may be exempted from taxation, and concludes that all laws exempting from taxation, property other than the property enumerated in said Article, shall be void. Section 6 reads:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Therefore, in view of the foregoing constitutional amendment, unless the property of this Farmers Mutual Insurance Company is exempt from taxation under the foregoing amendment there must clearly be a statute expressly exempting said property from taxation, or it is subject to taxation. The foregoing amendment to the Constitution does not specifically exempt such personal property from taxation. It is well-settled that the Legislature cannot increase the list of tax exemptions. See: State ex rel. Tompkins vs. Shipman, 234 S.W. 60, 290 Mo. 65.

It might be considered constitutional if the Legislature should enact a law specifically exempting such property of farmers mutual insurance companies from taxation under authority and by virtue of that part of Section 6, Article X, supra, which reads, in part:

"* * * and all property, real and personal, not held for private or corporate profit and used exclusively for * * * * * or for agricultural and horticultural societies may be exempted from taxation by general law. * * *".

However, we need not pass upon the constitutionality of such a provision, because it is, more or less, a moot question, in the absence of such legislation at this time.

From your request it appears as if this farmers mutual insurance company is contending such personal property is exempt from taxation solely by reason of Section 6177.

page 326, Laws of Missouri, 1947, which reads, in part:

"Hereafter all farmers' mutual fire and lightning insurance companies now organized or hereafter organized in this state for the sole purpose of mutually insuring the property of the members, and for the purpose of paying any loss incurred by any member thereof and expenses of the company by assessment, or for anticipated losses and expenses for two years next following the date of the assessment, as provided by their constitution and by-laws, are hereby exempted from the provisions of this chapter as applicable to general insurance companies, and nothing therein shall be so construed as to impair or in any manner interfere with any of the rights or privileges of any such companies doing a mutual insurance business in this state as herein provided: * * *".

Section 6177, supra, is a part of Chapter 37, R.S. Mo. 1939. In that same Chapter relating to insurance companies, we find Section 6092, page 1025, Laws of Missouri, 1945, which reads:

"The real and tangible personal property owned by insurance companies operating in this state shall be assessed and taxed as is real and tangible personal property owned by individuals, and the payment thereof and the distribution of the amounts received shall be in the manner provided by the general revenue laws of this state."

We are faced with a very unusual situation. In view of the two statutes hereinabove referred to, one exempting farmers mutual insurance companies from the provisions of Chapter 37, as applicable to general insurance companies, and the other specifically taxing real and tangible personal property owned by insurance companies operating in this State. Another well-settled rule of construction is that an exemption from taxation can be sustained only when expressed in explicit terms, and it cannot be extended beyond

Honorable Howard B. Lang, Jr. -4-

the plain meaning of those terms. National Cemetery Association of Missouri vs. Benson, 344 Mo. 784, 129 S.W. (2d) 842, 122 A.L.R. 893,

As we construe the foregoing provisions, farmers mutual insurance companies are exempt from the provisions of Chapter 37, and, therefore, Section 6092, supra, taxing real and tangible personal property owned by insurance companies does not apply to farmers mutual insurance companies. However, we are of the opinion that such general exemption from the provisions of Chapter 37, R.S. Mo. 1939, is not sufficient to exempt such personal property of a farmers mutual insurance company from taxation, in that it does not fully comply with the rule laid down in National Cemetery Association vs. Benson, and American Bridge Co. vs. Smith, supra. By merely saying that the provisions of laws applicable to insurance companies do not apply to such farmers mutual insurance companies, does not create a specific and express exemption from taxation of personal property of such companies.

CONCLUSION

Therefore, it is the opinion of this Department that, in the absence of an express and specific exemption under the law, of personal property owned by farmers mutual insurance companies, such property is taxable in this State.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

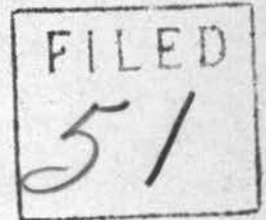
J. E. TAYLOR
Attorney General

ARH:lr

JB

COUNTY HOSPITALS: Trustees of County Hospital formed under provisions of Article 4, Chapter 126, R. S. Mo. 1939, as amended Laws 1945, cannot bring suit or be sued as such but actions pertaining to such hospitals must be brought in the name of the real party in interest-the County.

October 27, 1948



Mr. Howard B. Lang
Prosecuting Attorney, Boone County
Columbia, Missouri

Dear Sir:

This will acknowledge receipt of your letter of September 27, 1948, in which you request an opinion of this department. Omitting caption and signatures, this request was as follows:

"The Boone County Hospital trustees have employed a local attorney to represent them in the collection of outstanding claims for hospital services. He has requested me to obtain an opinion from your office as to whether or not the trustees of the hospital are authorized to sue and be sued as such. This attorney takes the position that the hospital is a division of county government and that he is, therefore, entitled to request through me an opinion as to whether suit can be maintained in the name of the trustees.

"Your opinion in this matter would be appreciated."

Although your letter does not state, we assume that your hospital was organized under and by virtue of Article 4, Chapter 126, (Section 15,192 to 15,209) of the Revised Statutes of Missouri, 1939, as amended Laws 1945, page 983 and 1947, page 323. Section 15,194, Laws Mo. 1947, page 323, R. S. Mo. 1939, authorizes the County Court to appoint Trustees for the County Hospital, and provides for their term of office.

It appears from a reading of the aforesaid Article 4, and amendments thereto, that the Board of Trustees, is administrative body who have the power to administer the affairs of the hospital. However, the real party in interest, in the event of a legal action, is the county and not the Board of Trustees. In fact Section 15,204 of the Revised Statutes provides that the title to any gift or donations of money, personal property or real estate for the benefit of a county hospital shall be in the county.

In view of the fact that the Board of Trustees is merely an administrative body and not the real party in interest, it would not have the right to sue nor could it be sued as such. Section 847.11 of the Missouri Revised Statutes Annotated provides as follows:

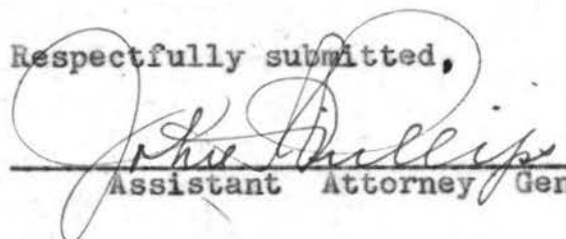
"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, curator, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name in such representative capacity without joining with him the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be brought in the name of the State of Missouri."

Since the Board of Trustees are not the real party in interest in any action brought for the benefit of a county hospital and since the statutes of Missouri provide that the real party in interest must prosecute all actions, the Board of Trustees of a county hospital can not sue or be sued as such.

CONCLUSION.

It is therefore the opinion of this department that the Board of Trustees of a county hospital organized under the provisions of Article 4 of Chapter 126 R.S. Mo. 1939 can not be sued nor can they sue as such, but any action pertaining to such type of hospital must be brought in the name of the county.

Respectfully submitted,


Assistant Attorney General.

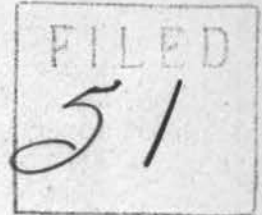
Approved:

J.E. TAYLOR, 9/13
Attorney General.

JSP/pw

PROBATE JUDGES: Salary in counties with population from 30,000 to 70,000 determined by assessed valuation of real and tangible personal property and value of intangible personal property not included.

December 3, 1948



12-6
Mr. Howard B. Lang
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Sir:

We have received your request for an opinion of this department which request is as follows:

"An opinion is requested of your office as to whether or not the intangible tax collectible in Boone County should be included in the assessed valuation of the county in determination of the salary of the Probate Judge and the salary which can be paid to the employees of the office under the provisions of Senate Bill 198, Laws Missouri 1945, page 1514, et seq."

Section 2 of Senate Committee Substitute for Senate Bill No. 198, 63rd General Assembly (Laws 1945, page 1514) provides that in counties having a population of more than 30,000 and less than 70,000 the salary of the probate judge shall be fixed according to the assessed valuation of such counties. That section further provides:

"For the purpose of this Act, the assessed valuations of all property in the respective counties, as last determined by the commission or other body provided by law for the equalization of taxes as between the counties next prior to the election of such judges, shall be deemed to be the assessed valuations for the ensuing terms of such judges."

Section 15, of House Committee Substitute for House Bill No. 528, 63rd General Assembly (Laws 1945, page 1810) provides that it shall be the duty of the State Tax Commission to equalize the valuation of real and tangible personal property among the several counties in the state. In making such equalization the State Tax Commission is required to determine the true value of the real and tangible personal property in each county. The provisions regarding equalization refer only to real and tangible personal property and do not include intangible personal property.

Provision for taxation of intangible personal property was made by House Committee Substitute for House Bill No. 868, 63rd General Assembly (Laws 1945, page 1914). That tax is administered by the Director of Revenue and the rate is fixed at 4% of the yield of intangible personal property. There is no provision for valuation of such property. The only authority given the State Tax Commission in connection with that tax is to hear appeals from assessments made by the Director of Revenue when he determines that an insufficient return was made or no return at all was made.

Thus, it can be seen that the Legislature has provided for the State Tax Commission's determining the value of real and tangible personal property in each county in order to equalize valuation among all counties of the state. No valuation is made of intangible personal property and consequently that property is not included by the Tax Commission in fixing the value of property in the various counties. Inasmuch as the Tax Commission makes such determination only as to real and tangible personal property we feel that the Legislature in enacting the provision regarding the salary of probate judges intended to include only the property, the value of which is determined by the State Tax Commission, and, therefore, did not intend to include intangible personal property, the value of which is, in fact, not determined.

CONCLUSION

Therefore, this department is of the opinion that Section 2 of Senate Committee Substitute for Senate Bill No. 198, 63rd General Assembly (Laws 1945, page 1514) which provides for the fixing of salaries of probate judges in counties having a population of from 30,000 to 70,000 according to assessed valuation, refers only to the assessed valuation of real and tangible personal property, and does not include intangible personal property.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:mw

PUBLIC HEALTH AND WELFARE: Final administrative authority
CANCER COMMISSION: of Cancer Hospital is Director
of the Department.

no 53
app. 3-12-48

March 10, 1948



Honorable Samuel Marsh, Director
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Marsh:

This is in reply to your request for an opinion concerning the administration of the Ellis Fischel Cancer Hospital at Columbia, Missouri.

As we understand your request, the principal question which you desire to have answered is "who is the final administrative authority in the operation of this State institution."

The State Cancer Hospital was established by the Cancer Commission under the authority contained in Chapter 125, R. S. 1939. Since the establishment of this hospital it has been operated and maintained by the Cancer Commission under the authority of that same chapter. In 1945 the General Assembly enacted legislation known as Senate Bill No. 349 which established the Department of Public Health and Welfare. "The scope and purpose of the department of public health and welfare shall be to improve and protect the health of the people of the State of Missouri; to care for the mentally ill and those who are ill from other causes, so far as the laws of Missouri shall provide; to provide care and maintenance for certain other persons, as provided by law; to administer laws concerning social welfare, including certain social security laws." (Laws of Missouri, 1945, page 946.) Said Senate Bill No. 349 then proceeds to establish this Department by organizing under one head the various institutions and agencies dealing with the public health and welfare. The bill provides that "The department of public health and welfare shall be controlled and administered by a director of public health and welfare." The bill further provides that the Department shall be composed of three divisions, namely, the Division of Health, the Division of Mental Diseases and the Division of Welfare. The divisions are placed under the supervision and direction of a Division Director appointed by the

Governor, by and with the advice and consent of the Senate. Section 6 of Senate Bill No. 349, Laws of Missouri, 1945, page 947, provides:

" * * * Each division director shall, subject to the supervision of the director of the department, be the chief administrative officer of his division respectively. Each division director shall appoint, subject to the approval of the director of the department, all employees in his division and may discharge, subject to the approval of the director of the department, such employees after proper hearing: Provided, such employment and discharge conform to practices governing selection of employees in the department of public health and welfare."

Section 13 of the bill contains the following provision:

" * * * The cancer commission of the State of Missouri, as established by Chapter 125, Revised Statutes of Missouri, 1939, as amended, is hereby assigned to the division of health in the department of public health and welfare."

It should be noted that Section 13 does not abolish the Cancer Commission, but assigns the Commission to the Division of Health. The real problem involved in your request is concerned with the extent of the authority of the Cancer Commission as distinct from the authority of the Department and the Division of Health.

It is a general rule of law that in construing statutes courts must ascertain and give effect to the purposes of the Legislature, and courts must keep in mind the furtherance of the purpose sought thereby. State ex rel. Kenney v. Missouri Workmen's Compensation Commission, 40 S.W. (2d) 503, 225 Mo. App. 501.

In 1945 the General Assembly, following the mandate of Section 12, Article IV of the Constitution of 1945, assembled together the various branches of the Executive Department and lodged in executive heads of the departments the duty and responsibility of the efficient exercise of their functions. When practicable, they placed broad general powers in these departmental executives so that they could coordinate the activities

within the department which related to the same general subject matter.

Senate Bill No. 349 vested broad powers in the Director of the Department and the directors of the respective divisions to administer the laws pertaining to the public health and welfare of the people of the State of Missouri. The bill assigned the Cancer Commission to the Division of Health without any restrictive provisos to the general authority granted the Director. All of the state institutions for the care of the mentally and physically ill and the aged were placed under the control and supervision of the Department. We believe that the Legislature intended that the Cancer Hospital at Columbia should also be a part of this Department so that all the agencies and institutions concerned with public health and welfare would be under one executive head. We think it would be inconsistent with logic and reason to hold that the Legislature intended that this one hospital should be divorced from the control and supervision of the very Department established for the furtherance of the public health and welfare of the State of Missouri.

We further believe it significant that during the reorganization program certain boards, bureaus and agencies were assigned to departments, but in the legislation providing for these assignments it was further provided that the executive heads of the respective divisions should have no control over their activities, as witness the following:

Laws of Missouri, 1945, page 737.

"The board of probation and parole shall be a division of the department of corrections, but shall not be subject to orders of the director of said department and shall only have such relationship with the department as is set out in this act."
(Underscoring ours.)

Laws of Missouri, 1945, page 1806.

"There is hereby created within the State Department of Revenue a commission to be known and designated as the State Tax Commission. The Director of Revenue shall have no supervision, authority or control over such actions or decisions of the State Tax Commission as relates to its duties prescribed by law."
(Underscoring ours.)

In Senate Bill No. 456, Laws of Missouri, 1945, page 1701, the Legislature created and established a division of the State Department of Education to be known as the Division of Registration and Examination. It assigned various licensing boards to this division but provided that the authority of the boards should remain distinct and separate and not subject to the control of the Department of Education.

Laws of Missouri, 1945, page 1701.

"Each board herein mentioned shall function under such statutes, rules and regulations that now exist which govern each respective board, and nothing herein contained shall be construed to deprive any of the above boards from exercising such right or authority as each board now has at this time."

Inasmuch as there are no modifying or excepting provisions, we believe that the Cancer Commission has become as much a part of the Department of Public Health and Welfare as other State health institutions and thus is subject to the supervision of the Director of the Division of Health and ultimately the Director of the Department of Public Health and Welfare.

Conclusion.

It is the opinion of this department that the final administrative authority of the State Cancer Hospital at Columbia, Missouri, is in the Director of the Department of Public Health and Welfare and the immediate supervision of the Cancer Commission is in the Director of the Division of Health within that Department.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JRB:ml

PUBLIC HEALTH AND WELFARE: Deputy administrator of Food and
Drug is subject to the Merit System Act.



March 31, 1948

H-1
Mr. Warren E. Lofton, Director
Bureau of Food and Drug Inspection
Division of Health of Missouri
Jefferson City, Missouri

Dear Mr. Lofton:

This is in reply to your request of recent date for an opinion on the question of whether the deputy in charge of Food and Drug administration comes within the terms of the Merit System Act, House Bill No. 162.

Section 22 of Senate Bill No. 349, Laws of Missouri, 1945, page 951, provides:

" * * * Said director shall have power to appoint a deputy who, under the director, shall be chiefly responsible for administration of laws pertaining to food and drugs, * * * "

Section 7 of Senate Bill No. 349, Laws of Missouri, 1945, page 947, provides, in part:

"Below the rank of director and assistant director, all employees shall be selected on the basis of merit as provided by law."

Section 2(b) of House Bill No. 162, Laws of Missouri, 1945, page 1158, provides:

"The provisions of this act shall apply to all offices, positions and employees of the State Department of Public Health and Welfare, * * * except such offices, positions and employees within the above named agencies as are herein specifically exempted."

Mr. Warren E. Lofton, Director -2-

Following Section 2(b) are several positions which are exempted from the operation of the terms of the Merit System Act, but in none of them is there provision made for an exemption of the Deputy Food and Drug Administrator. Therefore, under the terms of Section 2(b) of House Bill No. 162 and Section 7 of Senate Bill No. 349, the Deputy Administrator of Food and Drugs would be subject to the Merit System Act unless he would be exempted as an Assistant Director of the Division of Health. However, we do not believe that he is an Assistant Director. It has been generally held that an assistant does not mean a deputy (Ellison v. Stevenson, 22 Ky. (6 T.B.Mon.) 271, 276, 279).

Conclusion.

It is the opinion of this department that the Deputy Administrator of Food and Drugs in the Division of Health of the Department of Public Health and Welfare is subject to the terms of the Merit System Act as embodied in House Bill No. 162, Laws of Missouri, 1945.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JTB*

JRB:ml

PROSECUTING ATTORNEY: Where a Missouri statute fixes the salary of a county officer on the basis of population of the county and provides no method of determining such population, the population is to be measured by the last decennial census of the United States

January 15, 1948



Honorable Robert G. Mayfield
Prosecuting Attorney
Laclede County
Lebanon, Missouri

Dear Sir:

We have your letter of December 5, 1947, in which you request an opinion of this department. Your letter is as follows:

"The Department of Commerce has recently announced new population figures and this is to inquire if that statement of the population is such as to meet the requirements of Section 12939.1, Mo. R.S.A., Laws of Missouri, 1945, Section 1, page 1537.

"Attention is invited to Section 12939 of R.S. of 1939 wherein the last sentence of this Section reads as follows: 'The number of inhabitants of any County, for the purpose of this Section, shall be determined by the last decennial census of the United States.' The new Section enacted in 1945 referred to in the preceeding paragraph does not contain the sentence which has just been quoted. It would therefore appear that if a population figure was determined by the Census Bureau between two decennial census, such would be sufficient upon which to base a salary therein referred to.

"I would like an opinion upon this question."

The law relative to salaries of prosecuting attorneys as set forth by Section 11314, R.S. Mo. 1929, after fixing the salaries in accordance with the population of the counties, provided as follows:

"* * * The number of inhabitants of any county shall, for the purpose of this section be ascertained by multiplying the whole number of votes cast at the last preceding presidential election by five, until after the population of such county shall have been ascertained by the next decennial census of the United States."

This was the statute as it existed on the subject under consideration prior to 1933. The above mentioned section, however, was repealed and a new section enacted in lieu thereof in 1933, Laws of Missouri 1933, page 178. This 1933 law provided that the population shall be determined by the last decennial census of the United States, and is the same section cited and quoted in your letter as Section 12939, R.S. Mo., 1939. Thereafter, as indicated by you, Section 12939.1, Mo. R.S.A., was enacted in 1945, Laws of Missouri, 1945, Section 1, page 1537, which did not contain any provision as to how the population should be determined for the purposes of the act.

With the foregoing facts in mind, we now refer to the fact that the aforesaid 1945 act did not specifically repeal the preceding act, which provided that the population should be determined by reference to the last decennial census of the United States, in its entirety, but merely repealed by implication such portions thereof as were inconsistent with the 1945 act. We are, therefore, of the opinion that, since the 1945 act contained no provision as to how the population was to be determined for the purposes of the act, the provision of the previous statute to the effect that the population was to be determined by reference to the last decennial census of the United States remained unimpaired and is still in force.

Furthermore, even if the latter act should be construed as having repealed said provision of the former act, the situation would then be that the statute is silent as to how such population should be arrived at, and we are of the opinion that, under such construction of the statute, the following language of the Supreme Court of Missouri in *Hardin v. Jefferson County*, 147 S.W. (2d) 643, 1.c. 644, is applicable:

"The legislature provided no special statutory method to determine the population of a county under Sec. 7892. Absent such a method, the question of population is fixed by the last decennial census, which is the census of 1930. * * *"

Hon. Robert G. Mayfield

-2-

CONCLUSION

We are accordingly of the opinion that the population of counties for the purposes of Section 12939.1, Mo. R.S.A., Laws of Missouri 1945, Section 1, page 1537, must be determined by reference to the last decennial census of the United States.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

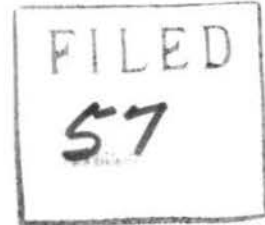
J. E. TAYLOR
Attorney General

SMW:LR

PUBLIC HEALTH AND WELFARE: Final administrative authority
CANCER COMMISSION: of Cancer Hospital is Director
of the Department.

3-10-48

Honorable Samuel Marsh, Director
Department of Public Health & Welfare
State Office Building
Jefferson City, Missouri



Dear Mr. Marsh:

This is in reply to your request for an opinion concerning the administration of the Ellis Fischel Cancer Hospital at Columbia, Missouri.

As we understand your request, the principal question which you desire to have answered is "Who is the final administrative authority in the operation of this State institution."

The State Cancer Hospital was established by the Cancer Commission under the authority contained in Chapter 125, R.S. 1939. Since the establishment of this hospital it has been operated and maintained by the Cancer Commission under the authority of that same chapter. In 1945 the General Assembly enacted legislation known as Senate Bill No. 349 which established the Department of Public Health and Welfare. "The scope and purpose of the department of public health and welfare shall be to improve and protect the health of the people of the State of Missouri; to care for the mentally ill and those who are ill from other causes, so far as the laws of Missouri shall provide; to provide care and maintenance for certain other persons, as provided by law; to administer laws concerning social welfare, including certain social security laws." (Laws of Missouri, 1945, page 946.) Said Senate Bill No. 349 then proceeds to establish this Department by organizing under one head the various institutions and agencies dealing with the public health and welfare. The bill provides that "The department of public health and welfare shall be controlled and administered by a director of public health and welfare." The bill further provides that the Department shall be composed of three divisions, namely, the Division of Health, the Division of Mental Diseases and the Division of Welfare. The divisions are placed under the supervision and direction of a Division Director appointed by the

Governor, by and with the advice and consent of the Senate. Section 6 of Senate Bill No. 349, Laws of Missouri, 1945, page 947, provides:

**** Each division director shall, subject to the supervision of the director of the department, be the chief administrative officer of his division respectively. Each division director shall appoint, subject to the approval of the director of the department, all employees in his division and may discharge, subject to the approval of the director of the department, such employees after proper hearing: Provided, such employment and discharge conform to practices governing selection of employees in the department of public health and welfare."

Section 13 of the bill contains the following provision:

**** The cancer commission of the State of Missouri, as established by Chapter 125, Revised Statutes of Missouri, 1939, as amended, is hereby assigned to the division of health in the department of public health and welfare."

It should be noted that Section 13 does not abolish the Cancer Commission, but assigns the Commission to the Division of Health. The real problem involved in your request is concerned with the extent of the authority of the Cancer Commission as distinct from the authority of the Department and the Division of Health.

It is a general rule of law that in construing statutes courts must ascertain and give effect to the purposes of the Legislature, and courts must keep in mind the furtherance of the purpose sought thereby. State ex rel. Kenney v. Missouri Workmen's Compensation Commission, 40 S.W. (2d) 503, 225 Mo.App. 501.

In 1945 the General Assembly, following the mandate of Section 12, Article IV of the Constitution of 1945, assembled together the various branches of the Executive Department and lodged in executive heads of the departments the duty and responsibility of the efficient exercise of their functions. When practicable, they placed broad general powers in these departmental executives so that they could coordinate the activities

within the department which related to the same general subject matter.

Senate Bill No. 349 vested broad powers in the Director of the Department and the directors of the respective divisions to administer the laws pertaining to the public health and welfare of the people of the State of Missouri. The bill assigned the Cancer Commission to the Division of Health without any restrictive provisos to the general authority granted the Director. All of the state institutions for the care of the mentally and physically ill and the aged were placed under the control and supervision of the Department. We believe that the Legislature intended that the Cancer Hospital at Columbia should also be a part of this Department so that all the agencies and institutions concerned with public health and welfare would be under one executive head. We think it would be inconsistent with logic and reason to hold that the Legislature intended that this one hospital should be divorced from the control and supervision of the very Department established for the furtherance of the public health and welfare of the State of Missouri.

We further believe it significant that during the reorganization program certain boards, bureaus and agencies were assigned to departments, but in the legislation providing for these assignments it was further provided that the executive heads of the respective divisions should have no control over their activities, as witness the following:

Laws of Missouri, 1945, page 737.

"The board of probation and parole shall be a division of the department of corrections, but shall not be subject to orders of the director of said department and shall only have such relationship with the department as is set out in this act."
(Underscoring ours.)

Laws of Missouri, 1945, page 1806.

"There is hereby created within the State Department of Revenue a commission to be known and designated as the State Tax Commission. The Director of Revenue shall have no supervision, authority or control over such actions or decisions of the State Tax Commission as relates to its duties prescribed by law."
(Underscoring ours.)

Honorable Samuel Marsh, Director -4-

In Senate Bill No. 456, Laws of Missouri, 1945, page 1701, the Legislature created and established a division of the State Department of Education to be known as the Division of Registration and Examination. It assigned various licensing boards to this division but provided that the authority of the boards should remain distinct and separate and not subject to the control of the Department of Education.

Laws of Missouri, 1945, page 1701.

"Each board herein mentioned shall function under such statutes, rules and regulations that now exist which govern each respective board, and nothing herein contained shall be construed to deprive any of the above boards from exercising such right or authority as each board now has at this time."

Inasmuch as there are no modifying or excepting provisions, we believe that the Cancer Commission has become as much a part of the Department of Public Health and Welfare as other State health institutions and thus is subject to the supervision of the Director of the Division of Health and ultimately the Director of the Department of Public Health and Welfare.

Conclusion.

It is the opinion of this department that the final administrative authority of the State Cancer Hospital at Columbia, Missouri, is in the Director of the Department of Public Health and Welfare and the immediate supervision of the Cancer Commission is in the Director of the Division of Health within that Department.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

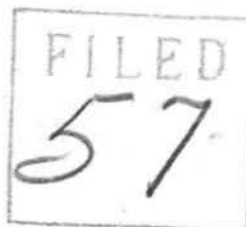
APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

BAIL: Authority of prosecuting attorney and circuit
CRIMINAL LAW: court to relieve sureties on bail bond when
CIRCUIT COURT: defendant fails to appear.

March 12, 1948



Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion which reads:

"Some months ago the Supreme Court affirmed a judgment sentencing a man to the pen. This man never appeared and the bondsmen have been unable to locate him although they has posted a reward and notified all the states west of the Mississippi river.

"The bond is for \$2500.00. Since it was made one of bondsmen married and an execution was issued. According to the Sheriff of Taney County who has the execution and according to the information I can get they are execution proof but one. They have offered to pay the sum of \$600.00, in satisfaction of this matter.

"I think under the circumstances that is as good as can be done. Please advise if I can with the consent of the circuit court, settle for the sum of \$600.00. Should this sum so received first be used to pay the costs?"

You inquire if you, as prosecuting attorney, with the approval and consent of the circuit court, may accept \$600.00 in lieu of the full amount of the bail bond, \$2,500.00 and costs.

We are unable to find any statute giving the prosecuting attorney such authority. Furthermore, a very old decision in this state very decisively holds that the circuit attorney or prosecuting attorney cannot release a surety on a forfeited recognizance. In State vs. Hoeffner, 28 S.W. 5, l.c. 8, the court, in so holding, said:

"* * * We are clear that, under the law of this state, a forfeiture of a recognizance can only be remitted by the court in which the forfeiture is entered 'upon cause shown,' by its entry of record, and that neither the circuit or prosecuting attorney has authority to bind the state for such a remittitur even by or with consent of the judge of such court, in vacation or at chambers. The statute confers the power upon the court; and the court, being one of record, must speak by its record, and the operation of the entry on the record can only be determined by its own terms. It follows that the court committed no error in refusing to recognize the agreement and payment to Mr. Ashley C. Clover as a satisfaction of the recognizance; and its judgment is affirmed. All concur."

Under Section 3973, R. S. Mo. 1939, it does appear that the circuit court may, for cause shown, remit this forfeiture. Section 3973 reads as follows:

"If, without sufficient cause or excuse, the defendant fails to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and thereupon the recognizance is forfeited, and the same shall be proceeded upon by scire facias to final judgment and execution thereon, although the defendant may be afterward arrested on the original charge, unless remitted by the court for cause shown."

Under Section 4189, R. S. Mo. 1939, the Governor is authorized to make a remitter when it is shown that by such forfeiture an injustice or hardship is suffered. Said Section 4189 reads as follows:

"For any fine imposed by any statute, and for any forfeiture of a recognizance, where the securities are made liable, the governor shall have power to grant a remitter, when it shall be made to appear to him that there is by such fine or forfeiture an injustice

done, or great hardship suffered by the defendant or defendants, which equity and good conscience would seem to entitle such defendant or defendants to be relieved from. All applications for such relief shall be in writing, signed by the party or parties seeking such remitter, and accompanied by a statement of the facts of the case, signed by the judge or circuit attorney of the county in which such fine or forfeiture is entered, and a certificate of the clerk that all costs have been paid; and the governor shall indorse his decision on each case and file the same in the office of the secretary of state."

The courts have, to some extent, defined "cause" as used in this section, and we are inclined to believe that the reason stated in your request for executing such a settlement does not come within the definition laid down by the Supreme Court of this state. One of the most recent declarations of the court will be found in the case of State vs. Wynne, 204 S.W. (2d) 927, l.c. 929, wherein the court held that the case before it did not involve an abuse of discretion by the circuit court, but a refusal to exercise discretion because the circuit court believed it lacked jurisdiction to do so, and that if that court was wrong in its belief, the case must be remanded, and that is just what the Supreme Court did. The circuit judge made a written statement in which he stated that he did not believe he had the power under the existing statutes, and particularly Section 3973, R. S. Mo. 1939, to discharge sureties in whole or in part, or to set aside the forfeiture, or to make any remitter; that it was his opinion that an application for remission should be addressed to the Governor, under Section 4189, R. S. Mo. 1939. Notwithstanding the above, the Supreme Court did more or less pass upon several grounds that the sureties claimed in support of their contention that the circuit court could grant them relief. One claim was that the recognizance was void because the principal had been declared insane, to which the court replied that the judgment of restoration was rendered two years prior to entering into recognizance, and while there was an appeal, it was dismissed and, therefore, the judgment spoke as of the date of its rendition. The court further held that neither could they sustain a contention that refusal of the Governor of the State of Louisiana to grant extradition exonerated them as a matter of law and of right, and said;

"Notwithstanding the mandatory wording of the Federal Law, there might be a variety of circumstances which would justify a governor in refusing extradition. The record now before us does not show such a circumstance, but even if it be true that the officials in Louisiana arbitrarily refused to act, yet that does not constitute an act of the law which necessarily excuses the sureties; rather it is a successful effort of the principal in the recognizance to evade the law or the unauthorized acts of strangers to the obligation. While there is an implied covenant on the part of the obligee state that it will, through its officers, render reasonable assistance in returning the fugitive, (Miller v. Commonwealth, 192 Ky. 709, 234 S.W. 307) there is no such implied covenant that another state will render such assistance. Upon her admittance to bail the custody of Mrs. Wynne was transferred to her sureties, the appellants. (6 Am. Jur., p. 85, sec. 93.) They had the right to prevent her from leaving the state, to arrest her within the state without warrant. Yet they must have known that she might return to her residence and business in New Orleans. We cannot hold that they were entitled to assume, as an absolute right, that Mrs. Wynne would not resist extradition or that efforts to extradite her would be successful."

The court further said:

"The courts generally hold that the sureties are discharged as a matter of law when the return of the defendant is prevented by (1) an act of God; (2) an act of the law; (3) an act of the obligee, the state where the criminal charge is pending. (Taylor v. Taintor, 16 Wall. 366, 21 L. Ed. 287; Id., 36 Conn. 242, 4 Am. Rep. 58; 8 C.J.S., Bail, Section 76, p. 147.) An illustration of the first would be the death of the accused; of the second, abolishment of the court in which accused is obligated to appear; of the third, granting extradition by the

governor of the obligee state to send the accused to answer a charge in another state."

"We think that the last clause in Section 3973, 'unless remitted by the court for cause shown,' relates to the whole section and vests the court with discretion to remit the penalty for cause at any time before final judgment on the recognizance. It clearly means that such discretion may be exercised without the production of the accused, but that the arrest of the accused by peace officers after forfeiture and before final judgment will not entitle the sureties to relief as a matter of right; good cause must still be shown.

"Of course, such discretion is a judicial one and subject to review if arbitrarily and unreasonably exercised either for or against the sureties. Section 4187 vests the governor with power, on ex parte hearing, to grant remitter even though the defendant is never produced and even after final judgment on the recognizance. It is not unreasonable to hold that by Section 3973 the general assembly intended to vest some discretion in the trial court while the matter is pending before it.

"Reading the three sections together, we come to these conclusions: under Section 3970 if the accused voluntarily surrender or is produced by the bailor before final judgment on the recognizance, the bailor, as of right, must be released on payment of the costs; under Section 3973, even though the accused is not produced, or is produced by peace officers and not by the bailor, the court may for cause remit the penalty upon payment of the costs; under Section 4189 the governor may remit with or without the production of the accused and before or after final judgment on the recognizance."

While the court did not exactly define "for cause shown" as used in Section 3973, R. S. Mo. 1939, from the foregoing, we understand the Supreme Court at least by implication indicated the rule to be as follows, that such phrase more or less should follow the grounds which have heretofore been so well established for discharging sureties as a matter of law, such as when the defendant is prevented from appearing (1) by an act of God; (2) by an act of law; (3) by an act of the obligee, the state where the criminal charge is pending; (4) by an act of a public enemy.

Judge Conkling rendered a separate and concurring opinion, which went much further and stated that since the statutes in this case did not define the phrase "for cause shown" that it might include other grounds than those four usually considered as a matter of law as authority for the court to discharge the sureties in whole or in part; that in his opinion, it should be left to the sound judicial discretion or judgment of the trial court; furthermore, that the abuse of which is reviewable on appeal.

Judge Hyde, in a separate, dissenting opinion, held that the defendants could not induce their principal to return, although she was free to do so, and gave his opinion that there is no cause at all for the circuit court to relieve the sureties; that his opinion is that "for cause shown" as used in Section 3973, R. S. Mo. 1939, means such cause as has long been established by the cases to be an excuse for sureties, and mentions the four established grounds for relieving the sureties quoted hereinabove; that such must be true in view of Section 4189, R. S. Mo. 1939, which authorizes a remitter by the Governor when it is shown to him that there is, by such forfeiture, an injustice done, great hardship suffered by the defendant or defendants, which equity and good conscience would seem to entitle such defendant or defendants to be relieve from.

In view of the foregoing decisions, we are inclined to hold that the sureties are liable in this instance, and the mere reason one surety may have to assume the whole burden upon forfeiture, is no valid reason for the prosecuting attorney and the circuit court agreeing to relieve the sureties and entering into a settlement for \$600.00, without even the payment of costs. The decisions all hold the sureties, when they make bail bond, are cognizant of the fact that they are responsible for the defendant's appearing at the time and place stated in the bond. Furthermore, they can prevent the defendant from leaving the state at any time that they have knowledge of his preparation for departure, and it is the chance they take when he is released to their sole custody under the bond.

Furthermore, by the enactment of Section 4189, R. S. Mo. 1939, the Legislature, giving the Governor of this state specific authority to make a remitter when it is shown to him that an injustice will be done or great hardships suffered by one or more of the defendants, indicates the same authority was not intended to be vested in the circuit courts. Had the Legislature so intended for the courts to have that authority, that body would certainly have followed the wording of Section 4189, supra.

CONCLUSION

Therefore, it is the opinion of this department that in this instance, the prosecuting attorney is unauthorized to execute a settlement with the sureties on a bail bond for failure of the defendant to appear, in lieu of the full amount of said bond and costs upon forfeiture of said bond. Furthermore, the circuit court may grant relief against sureties only for cause shown as provided in Section 3973, R. S. Mo. 1939, and such cause should be construed more or less along those well established grounds for relief, under which courts generally hold sureties may be discharged when the defendant fails to appear, which are by (1) an act of God; (2) an act of law; (3) an act of obligee; (4) an act of a public enemy.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:VLM

copy to Mr. John

SCHOOLS: In prosecuting an action for violation of the Compulsory Attendance School Law, an information must be filed.

FILED

57

March 13, 1948

3/16

Honorable Gordon Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Sir:

This is in reply to your request for an opinion, reading as follows:

"Please advise me if it is necessary for the prosecuting attorney to file an information against the parents who are guilty of violating the Compulsory Attendance School Law, Section 10587 and following, R.S. Mo. 1939. I think not.

"Also advise whose duty it is to prosecute this action. It would appear that it is the attendance officer's duty to do this."

In Section 10591, R.S. Mo. 1939, it is provided that the parents or guardians of children who violate any provisions of Sections 10587 to 10594, R.S. Mo. 1939, shall be deemed guilty of a misdemeanor. If complaint is made by the school attendance officer and prosecution is desired, it is our opinion that it would be necessary to file an information. Article 1, Section 17 of the Constitution of 1945, provides:

"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual

service in time of war or public danger,
nor to prevent arrests and preliminary
examination in any criminal case."

Senate Bill No. 193 of the 63rd General Assembly, Laws
of Missouri, 1945, page 751, Section 2, provides:

"Prosecutions before magistrates for
misdemeanors shall be by information,
* * *"

In answer to your second question, we believe that if the
particular district has a school attendance officer it would
be his duty to act as the prosecuting witness in the action.
Section 10591 provides that after investigation of the absence
of a child from school and after warning the parent or guard-
ian having custody of the child, "said school attendance
officer shall make complaint against said parent, guardian or
other person in charge of such child before the judge of the
juvenile division of the circuit court or before a justice of
the peace in the county where the party resides for refusal
or neglect to send such child or children to school; * * *"
However, we believe that it would be the duty of the prose-
cuting attorney, under Section 12942, R.S. Mo. 1939, to file
the information if he deemed it advisable to prosecute the
action further.

You will note that Section 10596, R.S. Mo. 1939, provides
that the circuit court shall have concurrent jurisdiction with
the court having general jurisdiction over misdemeanors to try
and determine any cases of violation of the provisions of
Sections 10587 to 10594.

Conclusion.

It is the opinion of this department that an information
must be filed against parents violating the Compulsory Attend-
ance Law if action is to be instigated. The school attendance
officer is the proper person to act as the prosecuting witness,
and the prosecuting attorney is the proper person to file the
information if in his judgment the action is warranted.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

J. E. TAYLOR
Attorney General

JRB:ml

SHERIFFS:

Sheriff in third class county is not authorized to charge county for incidental services supplied prisoners.

May 13, 1948



Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this department reading as follows:

"The County court of our county called me in conference in relation to the enclosed letter from Cooper county court, and which I enclose.

"An investigation of the facts disclose that two inmates of the Reformatory were lodged in our jail by the sheriff of Cooper county on the order of the circuit judge, and for safekeeping awaiting the trial to be had, on charges of murder. One of these boys 'cracked' and has since been removed from the jail of this county.

"The court informed me that Anna Hughes, wife of the sheriff, who has acted as jailor, has turned in two bills to our county court on these two juveniles from the county of Cooper. One bill was the costs of the average food bill for each prisoner. The other bill was an account for service rendered in caring for these juveniles in the county jail, such as running their errands, taking them food, cleaning their cells, washing their bed clothes and in cooking their food. The charges on this item have been running approximately \$1.00 per day, for each prisoner.

"I submit these facts, and request that you render to this county court and for the benefit of the county court of Cooper County, an

Honorable G. Logan Marr

opinion as to whether the wife of the sheriff as jailor has the legal right to make this charge for this service."

The question presented is whether or not, under the circumstances outlined in your letter, a sheriff may lawfully make a charge for incidental services rendered prisoners in his custody as such sheriff.

It is noted that Morgan County is one found in the third class under the classification of counties adopted by the General Assembly. It is also noted that this county has a population of 11,140, according to the 1940 census.

The provisions of Section 13547.301, Mo. R. S. A., control the salary paid to a sheriff in a county of the third class. The pertinent portion of this section reads as follows:

"The sheriff in counties of the third class shall receive annually for his official services in connection with the investigation, arrest, prosecution, custody, care, feeding, commitment and transportation of persons accused of or convicted of a criminal offense, the following sums: * * * in counties having a population of 10,000 and less than 11,500 the sum of \$1400; * * *" (Emphasis ours.)

You will note that this statute provides specifically that the salary set forth therein includes compensation for services rendered in connection with the custody, care and feeding of prisoners. Therefore, unless further statutory authority may be found authorizing charges of any nature in connection with these same matters, no such charge may be made.

The provisions of Section 13547.304, Mo. R. S. A., do authorize the reimbursement of the sheriff for the actual cost of feeding persons in his custody. This section reads as follows:

"The sheriff shall have the custody and care of persons lodged in the county jail and shall furnish them with clean quarters and wholesome food. At the end of each month the sheriff shall submit to the county court a statement supported by his oath or affirmation of the actual cost incurred by him in the feeding of persons under his custody together with the names of the persons, the number of days each spent in the jail, and whether or not the

Honorable G. Logan Marr

expenditure is properly chargeable to the county or to the state under the law. The county court shall audit said statement and draw a warrant on the county treasury for the amount of the actual cost payable to the sheriff. The county clerk shall submit quarterly to the State Director of Revenue a statement of the cost incurred by the county in the feeding of the prisoners properly chargeable to the state and the state shall forthwith pay the same to the county treasury."

We have examined the other statutes relating to the duties of the sheriff in connection with prisoners in his custody and are unable to find any statutory authority under which such sheriff may claim compensation for rendering services such as those outlined in your letter of inquiry. It might be noted that under the provisions of the latter statute quoted, the duty is directly imposed upon the sheriff of providing clean quarters for persons in his custody. In the absence of statutory authority for making such charges, it is our thought that a sheriff may not lawfully collect therefor.

CONCLUSION

In the premises, we are of the opinion that a sheriff in a county of the third class may not make any charges for services rendered persons in his custody in the county jail, except that such sheriff may be reimbursed by the county for his actual cost incurred in the feeding of such persons.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CRIMINAL COSTS:

County court liable for costs accruing as a result of a criminal complaint filed by individuals other than officer where accused is not arrested.

May 17, 1948



Honorable G. Logan Marr •
Prosecuting Attorney
Morgan County
Versailles, Missouri

5-19

Dear Mr. Marr:

This will acknowledge receipt of your letter of recent date, requesting an opinion of this Department, which letter, after omitting caption and signature, provides as follows:

"The facts disclose that felonious affidavits were filed in the magistrate court of Morgan County, Mo. for bogus checks. The sheriff or his deputies made several attempts to serve these warrants and ran up some mileage on the search for these defendants charged with crime. The defendants were not found because they could not be found and several had left the state and their whereabouts were unknown, and are still unknown.

"After about a year the magistrate disposed of these old cases pending on his docket by dismissing them, for the want of prosecution. The warrants not served were on file and contained charges for mileages incurred by the sheriff in his searches for these defendants. Most of the dismissals were not charged up against the complaining witness. The magistrate holding that it was not the fault of the complaining witness that the sheriff did not find the defendant and the defendant is still a fugitive.

"In the past if the sheriff ran up a lot of mileage on a warrant and then

failed to serve warrant on the defendant, the state did not pay the sheriff for looking for the defendant.

"The deputy sheriff in this county went back through last year and found quite a bill of warrants that he tried to serve but was unable to locate the defendant and bring him in. The County court raised the question as to whether, the county was liable for this service, this mileage.

"The deputy sheriff claimed that under Section 5, Laws of 1945 he was entitled to his mileage on these warrants. The County court read the section and could not agree that the deputy sheriff served the warrant when he ran up mileage looking for the defendant.

"Frankly I do not know and I am asking the attorney general for an opinion on whether the county court should pay the mileage on these warrants not served."

In your opinion request you did not state the classification of Morgan County, but from the best information which we can obtain, it is designated as a county of the fourth class. The provision of the Laws of Missouri for 1945, referring to the salary and compensation of a sheriff of fourth class counties is found on page 1547 of the Laws of Missouri for 1945, and the particular section of such law pertaining to the question at issue is Section 5, page 1549 of such volume. This section of the Statute provides the following:

"Section 5. Allowance for serving warrants.--In addition to the salary provided in Section 1 of this act, the county court shall allow the sheriffs and their deputies, payable at the end of each month out of the county treasury, actual and necessary expenses for each mile traveled in serving warrants or any other criminal process not to exceed five cents per mile."

At common law there was no liability on counties to pay such costs, neither is there any such liability now, in the absence of statutes, making the county liable for such costs. We think that it naturally follows that the same rule is applicable in cases of prosecutors and individual complainants. Volume 20, C.J.S., page 685, Section 441(a) lays down the general principle hereinabove enunciated with regard to liability of a county:

"At common law counties are never liable to pay any costs. If liable at all, such liability depends solely on statutes imposing it. * * *".

Also, in the same Volume, Section 439(b), page 681, we find the following:

"Inasmuch as the prosecutor's liability is dependent solely on statute, the payment of costs cannot be imposed on him except in such proceedings or prosecutions as are designated by statute. * * *".

See also, Volume 15, C.J., page 320, Sections 797 and 798.

It is well established that when there are no statutory or constitutional provisions, authorizing the payment of compensation for duties required to be performed by public officers, such services shall be performed gratuitously. Volume 43, Am. Jur., Section 340, page 134, reads, in part:

"* * * Whatever salary or emoluments may be attached by law to a public office do not belong to the incumbent because of any supposed legal duty resting upon the public to pay for the services rendered by him. In fact, it is sometimes expressly provided that certain officers shall receive no compensation, and a law creating an office without any provision for compensation may carry with it the implication that the services are to be rendered gratuitously. * * *".

Section 341, 43 Am. Jur., page 340, reads, in part:

"Any right which a public officer may have to a salary or compensation must generally be found in some provision of the law, for whatever may be the character of the compensation, whether an annual salary, a per diem allowance, or fees for particular services, it must depend upon the will of the people speaking through their Constitution, statutes, or ordinances. * * *".

In State ex rel. Buder vs. Hackmann, 305 Mo. 342, l.c. 351, the Court in so holding, said:

"The argument of hardship and that an officer should not be compelled to incur a financial loss, in performing the duties incident to his office, cannot be considered by the courts in passing upon the rights of relator, as fixed by the statute. Failure to provide a salary or fee for a duty imposed upon an officer by law does not excuse his performance of such duty. (State ex rel. v. Brown, 146 Mo. l.c. 406.) It may be that an assessor actually sustains a financial loss in the performance of his duties under our State Income Tax Law. But such fact is for consideration by the Legislature, and not by the courts."

See also: Ward vs. Christian County, 111 S.W. (2d) 182, l.c. 183, 341 Mo. 1115. We find statutes providing who shall pay costs in felony cases under most every conceivable circumstance. (Section 3900, R.S. Mo. 1939; Sections 4221-4228, inclusive, R.S. Mo. 1939). However, we fail to find any statutory provision as to who shall pay costs when a complaint has been filed by an individual prior to the filing of an information, and the person complained against cannot be found. No one has been committed, no recognizance

has been entered into, and no one acquitted or convicted, unless in such case such costs shall be paid out of the county treasury, as provided in Section 5, Laws of Missouri, 1945, page 1549.

It might be argued that a non est return as referred to in your letter, does not amount to serving a warrant or criminal process as provided in Section 5, supra. However, we believe that it does, in view of the statutes authorizing fees and mileage for making non est returns by sheriffs, such as under Section 13411, R.S. Mo. 1939, which provided a fee for every return of non est on a writ original of judicial, and further provided mileage for serving certain specified kinds of writs, also, Section 13413, R.S. Mo. 1939, allowing a fee for entering a return of non est on capias or attachments, also, for non est of subpoenas.

In view of the foregoing statutes, it is quite apparent that sheriffs have heretofore been compensated for making non est returns.

CONCLUSION.

Therefore, it is the opinion of this Department that the county is liable under Section 5, Laws of Missouri, 1945, page 1549, for costs accruing in a case where a felonious complaint has been made by an individual other than a public official, and where the sheriff or his deputy has been unable to find the party named in said warrant, and has made a non est return.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:ir

TAXATION: Farmers who hatch chickens or buy baby chicks and raise
MERCHANT'S such chickens and ship them to market are not "merchants,"
TAX: and such chickens as they own should be assessed as personal property on Jan. 1st of each year. Farmers who raise minks and sell pelts and breeding stock are not "merchants," and should be assessed Jan. 1st of each year on value of minks owned at such time.

June 3, 1948

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"The county assessor has asked me how the following business establishments will be assessed for taxes, for 1948 and future years:

"A-We have in this county several farms converted into 'broiler factories.' These places have the necessary equipment to either hatch their own chickens, or else they buy the baby chickens already hatched and raise them for the city markets. Now on Jan. 1 of each year they do not have any baby chickens on feed, or for sale. But in the first four to five months of the year the batteries will be full of these chickens being processed for the market. Are these establishments to be assessed under the merchants tax law? The sale of broilers amounts to quite a sale, but there is not very much on hand to assess on Jan. 1 of each year. If they make report of the chickens for sale, and be assessed on their largest sales like a merchant, then the establishments would bring in some taxes.

"B-In this county, we have mink farms. The breeding animals are worth \$100.00 to \$300.00 per pair. On Jan. 1 the breeding

stock are on hand. The mink raised and killed for skins are killed after the first of January. The revenue from the mink farm is in the pelts sold and the breeding stock sold. This is all after the 1st of the year. What is to be assessed, the sales of the pelts sold? Or, is this mink farm to be assessed as a merchant whose stock in trade is or are the minks killed and sold for the pelts? How are these kinds of establishments to be assessed?

"I am making a request for an official opinion on these kinds of special assessments."

Section 11303, Laws of Missouri, 1945, page 1838, provides as follows:

"Every person, corporation, copartnership or association of persons, who shall deal in the selling of goods, wares and merchandise at any store, stand or place occupied for that purpose, is declared to be a merchant. Every person, corporation, copartnership or association of persons doing business in this state who shall, as a practice in the conduct of such business, make or cause to be made any wholesale or retail sales of goods, wares and merchandise to any person, corporation, copartnership or association of persons, shall be deemed to be a merchant whether said sales be accommodation sales, whether they be made from a stock of goods on hand or by ordering goods from another source, and whether the subject of said sales be similar or different types of goods than the type, if any, regularly manufactured, processed or sold by said seller."

Section 11329, Laws of Missouri, 1945, page 1838, provides as follows:

"Any farmer residing in this state who shall grow or process any article of farm produce or farm products on his farm, is hereby authorized and permitted to vend, retail or

wholesale said products, free from license, fee or taxation from any county or municipality, in any quantity he may choose, and by doing so shall not be considered a merchant; provided, he does not have a regular stand or place of business away from his farm. And provided further, that any such produce or products shall not be exempted from such health or police regulations as any community may require."

Section 10, Laws of Missouri, 1945, page 1782, provides, in part, as follows;

"* * * After receiving the necessary forms the assessor or his deputy or deputies shall, except in the City of St. Louis, between the first day of January and the first day of June, 1946, and each year thereafter, proceed to make a list of all real and tangible personal property in his county, town or district, and assess the same at its true value in money in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such persons to make a correct statement of all taxable real and tangible personal property in the county owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax and except all other property which may be exempted by law from taxation. * * * The list shall then be delivered to the assessor. Such lists shall contain: * * * the number of domesticated rabbits, domesticated animals of all kinds and all other live stock and their value; the number of poultry including chickens, guineas, ducks and geese and their value * * *."

Since you state in your letter that the chickens raised on these farms are processed and shipped to the city market, we believe that under the provisions of Section 11329, supra, a person raising such chickens, whether he hatches them or purchases them, is not a "merchant" since such chickens are "farm produce or farm products." The chickens belonging to the per-

son operating such farm on January 1st of each year should be assessed as personal property on January 1st of each year.

The farmers who raise minks, under the provisions of Section 11329, supra, are exempted from taxation as "merchants." The farmers owning such minks should be assessed on January 1st of each year for the value of such minks since such minks are "domesticated animals."

CONCLUSION

It is the opinion of this department:

(1) That farmers who hatch chickens or buy baby chicks and raise such chickens, process them and ship them to the market are not "merchants," and that such chickens as they own should be assessed as personal property on January 1st of each year.

(2) That farmers who raise minks and sell the pelts and breeding stock are not "merchants" and should be assessed January 1st of each year on the value of the minks they own at such time.

Respectfully submitted,

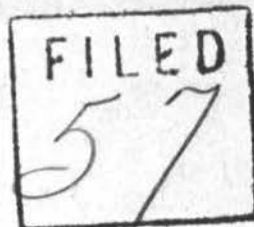
C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Burton
CHATTEL MORTGAGES:
RECORDER OF DEEDS:

When recorder shall file or record a chattel mortgage.



September 9, 1948

9-21

Mr. Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Massey:

This is in reply to yours of recent date wherein you request an opinion upon the following set of facts:

"A chattel mortgage which is not acknowledged or witnessed is offered for filing. Under the law shall same be filed?

"The same chattel is offered for filing and filed. Later the mortgagee requests that same be recorded. Under the law can the recorder record same? Can said chattel be acknowledged while in recorder's files, then recorded. If so how shall he show his records of filing and recording.

"Should the recorder ever receive a chattel without it being witnessed? Without it being acknowledged?"

The purpose for filing or recording a chattel mortgage is to give notice to the world of the existence of the lien created thereby.

Section 3486, R.S. Mo. 1939, which relates to filing chattel mortgages provides as follows:

"No mortgage or deed of trust of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged or trust property be delivered to and retained by the mortgagee or trustee or cestui que trust, or unless the mortgage

or deed of trust be acknowledged or proved and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded, or unless the mortgage or deed of trust, or a true copy thereof, shall be filed in the office of the recorder of deeds of the county where the mortgagor or grantor executing the same resides, and in the case of the city of St. Louis, with the recorder of deeds for said city, or, where such grantor is a nonresident of the state, then in the office of the recorder of deeds of the county or city where the property mortgaged was situated at the time of executing such mortgage or deed of trust; and such recorder shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or deed of trust, or copy thereof, may be so filed, although not acknowledged, and shall be as valid as though the instrument were fully spread upon the records of the county, or, in case of the city of St. Louis, upon the records of said city, in the office of the recorder of deeds; and such instrument, when acknowledged and recorded, or when the same, or a copy thereof, shall have been filed, as above provided, shall thenceforth be notice of the contents thereof to all the world."

A recorder, like other county and state officers, derives the authority to perform official duties from the statutes. The duties of a recorder with respect to recording are set out in Section 13161, R. S. Mo. 1939, which provides, in part, as follows:

"It shall be the duty of recorders to record: First, all deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged

according to law, and authorized to be recorded in their offices; * * * *"

This statute particularly deals with the duties of a recorder of deeds in respect to recording instruments which are proved or acknowledged. The first question which you submit is whether or not the recorder should file a chattel which is not acknowledged. Referring to said Section 3486, supra, it is indicated that a chattel mortgage may be filed in the office of the recorder of deeds even though it is not acknowledged. This section also indicates that if the chattel mortgage is acknowledged it shall be recorded by the recorder when requested so to do.

You also ask the question that in case a chattel mortgage is on file in the office of the recorder of deeds and the mortgagee desires to have the same recorded, then could the recorder record such chattel, and could this same chattel be acknowledged while in the recorder's files and then recorded; and if such procedure could be followed, how does the recorder show a record of the filing and recording.

Referring to the statute relating to the filing and recording of chattel mortgages we find no authority for the mortgagee to remove the chattel mortgage from the files and then have it recorded. Said Section 3486 seems to contemplate that the original chattel, or a copy, may be filed. Since there is no provision for the removal of a chattel mortgage from the files in the recorder's office except in case of payment of the note for which it is given to secure, we think the procedure contemplated by the lawmakers for the recording of a chattel is that if the mortgagee, or any other interested person, wants to have a chattel recorded and also filed in the chattel mortgage records, that they should file a copy of the chattel mortgage with the recorder for the chattel mortgage record and file the original chattel, duly acknowledged, with the recorder for the purpose of being recorded.

When this procedure is followed the recorder would show the record of filing and the record of recording such chattel the same as if they are two different and distinct mortgages.

In your last question you inquire as to whether or not a recorder should ever receive a chattel without it being witnessed or being acknowledged. Referring again to Sections 3486 and 13161, supra, we find no statute which would require a chattel mortgage to be witnessed or acknowledged unless the recorder is requested to record such instrument. In case he is requested to record the chattel mortgage then under said sections the instru-

ment must be acknowledged.

CONCLUSION

From the foregoing it is the opinion of this department:

- (a) The recorder of deeds should file chattel mortgage presented to him for that purpose even though they are not acknowledged.
- (b) That there is no authority under the statute for a recorder to record a chattel mortgage which is on file in the chattel mortgage files in his office.
- (c) That a chattel mortgage which is on file in the office of the recorder of deeds should not be removed and acknowledged and then recorded but that if the mortgagee desires that such chattel mortgage be recorded then he should file a copy of the chattel with the recorder for the chattel mortgage files and then have recorded the original which should be acknowledged before being recorded.
- (d) That the recorder of deeds may receive chattel mortgages for the purpose of being filed in the chattel mortgage records even though they are not witnessed but that if he is requested to record such chattel mortgage then he should not record it unless it is acknowledged.

Respectfully submitted,

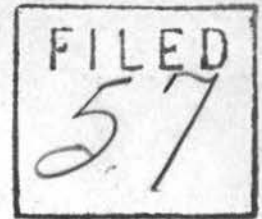
APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw

TYRE W. BURTON
Assistant Attorney General

JURY: Board of jury commissioners may determine number of jurors to be selected from each township for jury panel.



November 18, 1948

11-19

Honorable Gordon J. Massey
Prosecuting Attorney
Christian County
Ozark, Missouri

Dear Mr. Massey:

We have received your request for an opinion of this department which request is as follows:

"A question has arisen as to the distribution of those summoned for jurors in circuit court.

"We have 19 townships. Some do not have over 100 population and two or three have more than 1,000.00. The others vary. The law says the jurors shall be chosen according to population. Heretofore the court picking the jury has always taken at least one from each township regardless of population, and not to exceed two from some of the larger townships.

"If the selection is made on a prorata basis the larger townships will get as many as three or four and the smaller ones will only get one juror in a year. Please advise how the jury commission should fill the boxes from which the names should be drawn and the number from each township where the population varies as much as 10 to 1?"

Section 705, R. S. Mo. 1939 (Re-enacted Laws 1947, Volume II, page 276) contains the following provisions:

"The board of jury commissioners of each county not less than thirty days before the commencement of the Circuit Court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the board of jury commissioners in selecting

such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the townships from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed."

Section 706, R. S. Mo. 1939 (Re-enacted Laws Mo. 1947, Volume II, page 276) contains the following provisions:

"The clerk of the board of jury commissioners, so situated as to be unable to see the names on such slips, shall, publicly, in the presence of said board of jury commissioners, proceed to draw out names separately and singly from one township until he gets the number of names required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned: and in the same manner shall continue to draw names from each of the remaining townships, separately and singly, until he shall have drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of said court for which said petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn: * * *"

The method of selection provided in the above quoted sections was changed by the last session of the Legislature by providing that the selection of the jury list and panel should be made by a board of jury commissioners instead of the county court as formerly. Insofar as the number of names to be selected for the jury list and the method of apportioning such names is concerned, no change was made. The provision regarding apportionment was originally adopted in 1874 (Laws 1874, page 97, Section 2). The minimum number of names for the jury list has been increased since that time from one hundred and seventy-five to the present four hundred.

The courts of this state have held that the statutory procedure prescribed for the selection of names for the jury list, and persons for the jury panel, is directory, and, that, in the absence of a showing that one of the parties was prejudiced by reason of failure to adhere exactly to the statutory procedure, substantial compliance with the provisions of the statute is sufficient. *State v. Rouner*, 333 Mo. 1236, 64 S. W.(2d) 916, 92 A.L.R. 1099; *State v. May*, 172 Mo. 630, 72 S. W. 918.

Insofar as the question which you have presented is concerned, you will note that Section 705 requires the names selected for the jury list to be apportioned as nearly as possible among the various townships according to population. However, it further provides that the board of jury commissioners shall determine how many regular and alternate petit jurors shall be selected from each township but it does not require that they base such determination upon population. Undoubtedly, in most counties, population is the determining factor but in a county such as yours, with nineteen townships varying considerably in population, we perceive no reason for saying that the method heretofore used in selecting the panel should not continue to be followed. The jury commissioners should, of course, follow the statutory direction in regard to selecting names for the jury list insofar as practicable. For example, the number of names for a township with a population of one thousand should be ten times that for a population of one hundred, although two jurors and two alternates are to be selected from the former list and only one each from the latter. You will also note that the four hundred names required for the jury list is a minimum figure so that, if necessary, in order to effectuate the purpose of the statute, in a county such as yours, a larger number of names could be used and the requirement of apportionment according to population could be met.

CONCLUSION

Therefore, we are of the opinion that in selecting the petit jury panel in accordance with Section 705, R. S. Mo. 1939, (Re-enacted Laws 1947, Vol. II, page 274) the board of jury commissioners should obtain the required number of names for the jury list by apportionment among the various townships according to population, but that particularly in a county with a large number of townships, which vary widely in population, the board of jury commissioners may determine how many names should be drawn for each township and that in making such determination the board of jury commissioners need not do so solely on the basis of population. A system, whereby in your county, with nineteen townships, one regular and one alternate petit juror is chosen from each of the smaller

Hon. Gordon J. Massey

-4-

townships and two from each of the larger townships until the required number is obtained, complies with the requirements of the statute.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

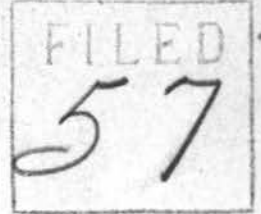
RRW:mw

APPROVED:

J. E. TAYLOR *JEB*
Attorney General

MAGISTRATE COURTS : No fee is allowed the magistrate in a
JUDGMENTS : proceeding to revive judgment of the
JUSTICE OF THE PEACE : justice of the peace court the record
of which was delivered to the magistrate.

December 21, 1948



12-22
Honorable Aubrey R. Marshall
Judge of the Magistrate Court
Randolph County
Moberly, Missouri

Dear Judge Marshall:

This is in reply to your request for the
opinion of this department, which is as follows:

"In the matter of Scire Facias to
Revive Judgment of Justice of the
Peace will you please inform us
what fee the Magistrate Court should
collect.

"Thanking you, "

At the outset it is well to note that a justice
of the peace judgment which is delivered to a magistrate
has the force and effect of a judgment rendered by said
magistrate, and may be revived to the same extent and in
like manner as if it had been originally rendered by such
magistrate. Laws of Missouri, 1947, Volume I, page 246,
Section 7a provides:

"That Section 7 of An Act of the 63rd
General Assembly, known as Senate Bill
No. 207, approved by the Governor on
March 11, 1946, relating to the resig-
nations of magistrates and to the de-
livery of records of justices of the
peace to magistrates, be and the same
is hereby repealed and to enact in lieu
thereof two new sections relating to
the same subject matter, to be known
as Sections 7 and 7a, and to read as
follows: "

Thus, we must consider the justice of the peace judgments in question as if they had been rendered by the magistrate. The provisions by which a judgment of the magistrate court may be revived are found in the Laws of Missouri, 1945, page 765, Sections 118 to 127, inclusive.

We now arrive at the question presented concerning the fee allowed the magistrate for the revival of such judgments. There are no provisions in the statutes comprising the magistrate law which allow the magistrate a specific fee in proceedings for the revival of judgments. The Laws of Missouri, 1947, Volume I, page 240, Section 23, sets out the only fee which is allowed the magistrate in civil proceedings. That section is, in part, as follows:

"A fee of five (\$5.00) dollars shall be allowed the magistrate in each civil proceeding, general or special, instituted in his court. Upon the commencement of any such proceedings in the magistrate court except in cases instituted by the state, county or other political subdivision the party commencing the same shall pay to the clerk of said court such magistrate fee of five dollars (\$5.00). * * * ."

The magistrate fee is allowed the magistrate upon the commencement of any civil proceeding instituted in his court. It is well settled in Missouri that a proceeding to revive a judgment is not a new proceeding but is a continuation of the original cause of action. The nature of the proceeding itself makes this conclusion clear. In *Beattie Mfg. Co. vs. Gerardi*, (Mo.) 214 S.W. 189, the Supreme Court made the following statement at page 191:

"* * * It has been said so often as to be trite that a scire facias to revive a judgment is not an original action but a continuation of a former proceeding and ancillary thereto; that it is in effect but the application by the plaintiff to the court for an execution on a judgment about to become dormant. * * * ."

It was also said in the case of *In re Jackman's Estate*, 344 Mo. 49, 124 S.W. (2d) 1189, at page 1191, that:

"* * * it must not be overlooked that the suing out of the scire facias was not a new proceeding, but was a continuation of the cause in which it was issued (Peak v. Peak et al., Mo. Sup., 181 S.W. 394, loc. cit. 395, and cases there cited), * * *."

Further language to this effect is found in City of St. Louis, et al. vs. Miller, et al., 145 S.W. (2d) 504, 235 Mo. App. 897, at page 506 (S.W.):

"* * * The application for the writ, whether it be in the form of a petition, motion, or praecipe, does not initiate an original suit. It does, however, initiate the proceeding for the revival of the judgment. In that respect it serves an essential function. It serves no essential function as a pleading. That function is served by the writ. Defendant contends that since the writ serves the double purpose of pleading and process, the proceeding for revival of the judgment is not commenced until the writ is issued, and thus draws a distinction between an original suit and scire facias. We regard the distinction as unsubstantial. * * *."

See also: Peak vs. Peak, et al., 181 S.W. 394, l.c. 395, and State ex rel. Buder vs. Hughes, et al., 166 S.W. (2d) 516, l.c. 519.

In view of the fact that the further proceeding to revive a judgment of the magistrate court is ancillary and a continuation of the original cause of action, it is evident that the magistrate fee allowed upon the commencement of said original proceeding is the only fee that can be allowed the magistrate.

CONCLUSION.

Therefore, it is the opinion of this department that no fee is allowed the magistrate in a proceeding to

Honorable Aubrey R. Marshall -4-

revive a judgment of the justice of the peace court the
record of which has been delivered to the magistrate.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

DD:ir

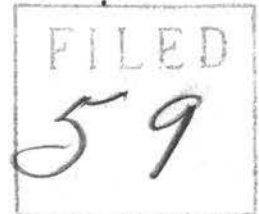
Bureau

GRAIN WAREHOUSE ACT: Public warehouseman in Missouri who has published schedule of rates for storage of grains under Sec. 24, Laws 1941, p. 373, and is operating under a warehouse license in this state, cannot discriminate between customers and cannot deviate from published schedule as to period of free time or any other charge. Mill operating in Missouri which is not licensed can accept grain for storage if it falls within the definition of "local public warehouse."

March 19, 1948

Mr. A. E. McInerney
Grain Warehouse Commissioner
1108 Board of Trade Building
Kansas City, Missouri

2-22



Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department on two questions asked by Mr. Frank A. Theis, Chairman of the Elevator Committee for the Board of Trade of Kansas City. The questions are:

"1 - Whether or not a public warehouseman, as defined in the Missouri Revised Statutes, who has published a schedule of charges under Section 14685.24, and is operating under a warehousing license of your Department, can, under Section 14685.22 of the Missouri Revised Statutes, discriminate between the storage customers, and deviate from the schedule of charges outlined in his published tariff as to the period of free time, or other warehouse charges.

"2 - Whether or not a mill operating in the state of Missouri, which is not licensed as a warehouse with your Department, can accept grain for storage."

Section 24, Laws of Missouri, 1941, page 373, provides, in substance, for the maximum charge for storing and handling of grain in terminal public houses and local public warehouses. Such section further provides that the owner, operator or manager of any terminal or local public warehouse in the state is required, during the first week in June, or upon receipt of his license, to publish a table or schedule of rates for the storage of grain in his warehouse during his licensed period. The warehouseman may publish in his table or schedule of rates any charges he desires to make, so long as they do not exceed the maximum set out in such section.

Section 22, Laws of Missouri, 1941, page 373, provides that every terminal public warehouseman shall receive for storage any grain suitable for warehousing, to the capacity of his warehouse available for public storage, not making any discrimination among the persons desiring to avail themselves of the warehouse facilities.

Section 23, Laws of Missouri, 1941, page 373, provides that every local public warehouseman subject to the provisions of the Missouri Grain Warehouse Act shall receive for storage or shipment, so far as available capacity of his warehouse shall permit, all grains suitable for storage, without discrimination of any kind.

It is to be noted that Section 24, supra, does not provide that the warehouseman shall publish a table or schedule of maximum rates for the storage of grains in his warehouse during his licensed period, but that he shall publish a table or schedule of rates which are to be charged by him during his licensed period, with the restriction that such rates shall not be in excess of the maximum provided by the statute. Therefore, we believe it to be clear that the rates published by the warehouseman must be charged by the warehouseman on all grains stored in his warehouse.

Sections 22 and 23, cited supra, providing that there shall be no discrimination in either terminal or local public warehouses, prevent discrimination not only as to the persons whose grain is accepted for storage in the warehouse, but also in the charges that may be made for the storage of grains in such warehouses.

Therefore, a public warehouseman who has published a schedule of charges under Section 24 of the Act, and is operating under a warehouseman's license of the State of Missouri, cannot discriminate between the charges he makes for the storage of grain, and cannot deviate from the schedule of charges which he has caused to be published with regard to the period of free storage or any other warehouse charge.

Section 17, Laws of Missouri, 1941, page 373, defines "terminal public warehouse" and contains a proviso that any such warehouse not in excess of one hundred fifty thousand bushels measured capacity shall be deemed a local public warehouse within the meaning of the Grain Warehouse Act unless the operator makes application for a license as a terminal public warehouse and guarantees the expense of weighing and inspection therein.

Mr. A. E. McInerney

-3-

Section 18, Laws of Missouri, 1941, page 373, defines "local public warehouse."

Section 19, Laws of Missouri, 1941, page 373, provides that no person, firm, corporation or association shall engage in business as a public warehouseman until a license for engaging in such business has been issued by the Commissioner, with the further proviso that the requirements of Section 19 are optional with local public warehouses as defined in Section 18.

Therefore, if a mill operating in the State of Missouri comes within the definition of "local public warehouse," and such mill has not requested that it be covered by the provisions of Section 19 of the Act, such mill can accept grain for storage without being licensed by the Commissioner.

CONCLUSION

It is the opinion of this department that a public warehouseman in this state who has published a schedule of charges under Section 24 of the Grain Warehouse Act, and is operating under a warehousing license of the Grain Warehouse Department of this state, cannot discriminate between storage customers, and cannot make any charges other than those set forth in the published schedule of rates, and cannot make any discrimination among his customers as to free storage time or any other warehouse charges.

It is further the opinion of this department that a mill operating in this state which comes within the definition of "local public warehouse" as defined in Section 18 of the Grain Warehouse Act, and which has not voluntarily come within the provisions of Section 19 of the Act, can accept grain for storage without being licensed by the Commissioner.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JTB

CBB:HR

COUNTY SCHOOL FUND: Proposal to liquidate carried where receives majority of votes cast both for and against proposal.



November 24, 1948

Honorable Roy W. McGhee
Prosecuting Attorney
Wayne County
Greenville, Missouri

11-29

Dear Mr. McGhee:

We have your letter of recent date, requesting an opinion of this office as to whether or not the County Clerk of your County should certify that the proposal for the annual distribution of the capital of the liquidated county and township school funds, submitted at the recent election, was carried at said election. You stated that there were 4,571 votes cast in the County at the general election for the office of Governor, but that only 1,135 votes were cast for the above proposal and 185 votes cast against said proposal.

We believe that a conclusion in this matter can be reached by careful consideration of the applicable statutes. Section 10376.2, Mo. R.S.A., provides, in part, that:

"Said proposal shall be submitted at a special election to be held for that purpose within sixty days after the filing of the petition therefor or at the next general election held in such county. * * * *"

Said section further provides:

"* * * * Such special election shall be governed in all respects by the general election laws except wherein such general election laws are in conflict with this article. * * * *"

Regarding the certification of the results of such election, we find the following provision in said section:

"* * * * The results of the balloting at each election precinct shall be certified by the judges of election of such election precinct and attested by the clerks and transmitted to the body having control of the capital of the county and township school funds, which said body shall, from such results so certified and attested, within ten days, determine whether the proposal to distribute annually the liquidated capital of the county and township school funds has received a majority of the votes cast in the county or City of St. Louis wherein such election shall have been held. If the proposal to distribute annually the capital of the liquidated county and township school funds shall receive a majority of the votes cast, the body having control of such county and township school funds shall proceed to thereafter distribute annually such liquidated funds to the school districts.* * *"

Therefore, we see that the proposal is submitted at a special election regardless of whether the election is held by itself or in connection with a general election. Of course, under the well settled rules of statutory construction, the intent of the Legislature is of primary concern in the construction of statutes. We believe that the evident intent of the Legislature, in providing that the proposal shall carry if it receives a majority of the votes cast, was that the proposal should carry if it receives a majority of the votes cast in the special election. That is to say, a majority of the total of the votes cast, both in favor of and against the proposal. The fact that the special election on said proposal was held in connection with the general election, and that more votes were cast for certain state and county officers than were cast both for and against said proposal, should be of no consequence.

CONCLUSION

In view of the foregoing, it is the opinion of this office that, if, in an election on the proposal for the annual distribution of the capital of the liquidated county

Hon. Roy W. McGhee

-3-

and township school funds, a majority of the votes cast on said proposal are favorable, said proposal should be certified as carried in the manner provided in Section 10376.2, Mo. R.S.A., and other applicable statutes.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

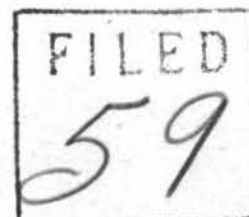
J. E. TAYLOR
Attorney General

DD:LR

GRAIN AND WAREHOUSE: Operator of elevator storing grain for United States government requesting and obtaining state inspection must obtain state license. Name of each elevator should be shown on state license. License should be displayed in office room of elevator building. It is optional with local public warehouseman whether or not he secures state license. State warehouse receipt may be issued only by licensed public warehouseman on form approved by commissioner. Registrar must be appointed at each place where licensed public warehouse is situated.

December 3, 1948

12-3



Mr. A. E. McInerney
Grain Warehouse Commissioner
Missouri Grain Warehouse Department
Kansas City, Missouri

Dear Sir:

This is in answer to your letters of recent date requesting an official opinion of this department and reading in part as follows:

"(1) Should the operator of and elevator whose entire operation is the storing of grain for the United States Government, the owner or operator of which requests and obtains state inspection and weighing and guarantees the expense thereof, be required to obtain a state license.

"(2) When state licenses are issued to an operator who is operating several elevators in the state, should not the name of each elevator as well as the city or county in which the elevator is located be shown on the license. As an example, we have the Norris Grain Company, who have applied for license to operate the Norris Elevator in Jackson County, the Burlington Elevator in Clay County and the Norris Grain Company Elevator in Webb City. Each license would show the Norris Grain Company as the operator but without showing the name of the elevator to which each license applies could lead to confusion.

"(3) Should not the license be displayed in the office room of the elevator building, and not in the general office of the operating firm. (See Sec. 21 of the Grain Warehouse Department Laws)"

"I would like to have your opinion of the provision in Section 19. of the Grain Warehouse Department Laws, wherein it states on page 32 'Provided, further that the provisions of this section shall be optional with local public warehouses as defined in the preceding section'..

"Could this provision be construed to mean that it is optional with the operator of a local public warehouse whether or not he secures a license, or, does it mean that it is optional with him whether he secures a Terminal Public Warehouse License or a Local Public Warehouse License.

"I would also like an opinion in connection with Section 27, wherein it states 'Public Warehouse receipts may be issued by any licensed public warehouseman etc.' Does the wording 'may be issued' mean that it is optional with him whether he issues our approved warehouse receipt, and could there be an unlicensed public warehouse within the meaning of the Grain Department Laws.

"Section 38 states that 'The Commissioner, in addition to the registrars located to serve terminal warehouses, may appoint some person or persons, not employees of the Department, at each point where local public warehouses are situated as registrars of receipts, etc.' Does this mean that we would have to appoint a person as registrar at each point where a local public warehouse is situated."

Your first question inquires as to whether or not an operator of an elevator, whose sole business is the storing of grain for the United States government and who requests and obtains state inspection and weighing and guarantees the expense thereof, must have a state license.

Section 16 of the Missouri Grain Warehouse Act, Laws of Missouri, 1941, page 373, defines "public warehouse" and "private warehouse." "Public warehouse" is defined as buildings, elevators or warehouses in this state used for the purpose of storing grain of different owners for a compensation. "Private warehouses" are defined as buildings, elevators or warehouses used for the purpose of storing grain exclusively for the owners or operators of such buildings, elevators or warehouses. We believe the fact that the warehouses about which you inquire in your letter have at the present time only one customer, that is, the United States government, does not preclude such warehouses from being "public warehouses."

Section 2 of the Grain Warehouse Act provides that the state warehouse department shall have exclusive right to weigh or supervise the actual weighing of grain in licensed public warehouses, and may weigh or supervise the actual weighing of grain in private warehouses or industries. Since the department is authorized to weigh or supervise the weighing of grain only in "public warehouses" and "private warehouses," it is obvious that the department is limited to these two types of warehouses. Since this is true, we believe that it was the intention of the Legislature to include within the definition of public warehouses the warehouses which at present store grain exclusively for the United States government.

Section 17 of the Grain Warehouse Act defines "terminal public warehouse" and provides as follows:

"The term terminal public warehouse, as used in this act, shall mean any public warehouse located in any city in this State which now has or may hereafter have a population of seventy-five thousand or more, or a local public warehouse in this state, the owner or operator of which requests and obtains state inspection and weighing and guarantees the expense thereof; provided, any such elevator or warehouse not in excess of one-hundred fifty thousand bushels measured capacity shall be deemed a local public warehouse within the meaning of this act unless the operator thereof shall make application for a license as a terminal public warehouse and shall guarantee the expense of weighing and inspection therein."

Since the definition of "terminal public warehouse" provides that the term includes any warehouse in any city in this state which now has or may hereafter have a population of 75,000 or more, or a local public warehouse, the owner or operator of which requests and obtains state inspection and weighing and guarantees the expenses thereof, we believe it to be obvious that the operator of the grain elevator, whose entire operation is the storing of grain for the United States government and who requests and obtains state inspection and weighing and guarantees the expense thereof, must, under the provisions of Section 19 of the act, procure a state license.

Your second question inquires whether or not the name of each elevator covered by a state license should be shown on such license. We believe it to be clear from Sections 19 and 20 of the act that the name of each elevator should be listed on such licenses.

Your third question inquires whether the license should be displayed in the office room of the elevator building or in the general office of the operating firm.

Section 21 of the act provides that the license shall be displayed "in the office room of said warehouse." It is clear from the quoted provision of Section 21 that the license should be displayed in the office room of the elevator building.

Your fourth question inquires whether the provision "Provided, further that the provisions of this section shall be optional with local public warehouses as defined in the preceding section," means that it is optional with the operator of the local public warehouse whether he secures a license, or whether he secures a terminal public warehouse license or a local public warehouse license.

From the provision of Section 19, we believe that the quoted provision supra about which you inquire means that it is optional with a local public warehouse operator whether or not he wishes to be licensed. If a local public warehouse elevator operator does not wish to come within the purview of the Missouri Grain Warehouse Act, he is not forced to do so and does not have to procure a state license.

Your fifth question inquires as to whether a public warehouseman may issue any warehouse receipt other than that warehouse receipt approved by your department, and whether there could be an unlicensed public warehouse within the meaning of the grain department laws.

From the provisions of Section 27 of the act, it is mandatory that any public warehouse receipt issued by any licensed public warehouseman shall be precisely in the form provided for and approved by the grain warehouse commissioner. As was pointed out supra, if a local public warehouseman does not elect to come within the provisions of the act by securing a state license, he cannot be compelled to do so. However, a state warehouse receipt may be issued only by licensed public warehousemen.

Your sixth question inquires as to whether or not the department must appoint a registrar at each point where a local public warehouse is situated.

Section 38 of the act provides that in addition to the registrar located to serve terminal warehouses, the commissioner may appoint some person or persons, not employees of the department, at each point where local public warehouses are situated as registrar of receipts. We believe the plain meaning of this to be that the commissioner must appoint a registrar at each place where a licensed public warehouse is situated. Since an unlicensed public warehouse is not authorized to issue Missouri warehouse receipts, the commissioner has no power to appoint a registrar at any place where only an unlicensed public warehouse is situated.

CONCLUSION

It is the opinion of this department that:

- (1) an operator of an elevator, whose entire operation consists in the storing of grain for the United States government, the owner or operator of which elevator requests and obtains state inspection and weighing and guarantees the expense thereof, is required to obtain a state license;
- (2) the name of the elevator as well as the city or county in which the elevator is located should be shown on each state license;
- (3) the state license of a public warehouseman should be displayed in the office room of the elevator building;

Mr. A. E. McInerney

-6-

(4) it is optional with the operator of a local public warehouse whether or not he wishes to obtain a state license and come under the provisions of the Missouri Grain Warehouse Act;

(5) a state licensed public warehouseman may issue warehouse receipts only in the form provided for and approved by the commissioner;

(6) the commissioner must appoint a registrar at each place where a state licensed public warehouse is situated.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JB

CBB:VLM

*Copy to
J. Smith 5/14*

TAXATION: - Assessor's duty to extend tax on omitted property in previous years, not county clerk's duty.

FILED

60

April 29, 1948

5-7

Honorable Robert I. Meagher
Prosecuting Attorney
Madison County
Fredericktown, Missouri

Dear Mr. Meagher:

This is in reply to your letter of April 26, 1948, requesting the opinion of this department on the following question:

"Should the assessor figure the tax that ought to have been assessed and paid in former years, or is it merely his duty to fix the value of the former years, and should the county clerk charge the amount of tax due for said omitted years?"

Your question is concerned with the proper interpretation and assignment of duties provided in House Substitute for House Bill No. 469, passed by the 63rd General Assembly and found in Laws of Missouri, 1945, at page 1789, as follows:

"If by any means any tract of land or town lot shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same, when discovered, shall be assessed by the assessor for the time being, and placed upon his book before the same is returned to the court, with all arrearages of tax which ought to have been assessed and paid in former years charged thereon."
(Underscoring ours.)

It is our opinion that the underlined portion of the statute should be interpreted to mean that it is the assessor's duty to extend the tax upon his assessment for the omitted years and place the same upon his book before it is returned to the court. Although normally it would be the clerk's duty to extend the tax under the provisions of Section 11048, Laws of Missouri, 1945, page 1958, we think that a fair construction of the language of this statute would seem to make the extension of omitted taxes the duty of the assessor, and not of the county clerk. Inasmuch as this is a departure from the procedure required by Section 11048, and it is not set out in too great detail in Section 20, we believe that any irregularity resulting from this procedure would probably be cured by the terms of Section 21 of House Substitute for House Bill No. 469, Laws of Missouri, 1945, at page 1789, which reads as follows:

"An assessment of property or charges for taxes thereon shall not be considered illegal on account of any informality in making the assessment, or in the tax lists, or on account of the assessment not being made or completed within the time required by law."


Conclusion.

Therefore, it is the opinion of this department that it is the duty of the assessor to extend the amount of tax due on property omitted from the list in previous years before returning his book to the court.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

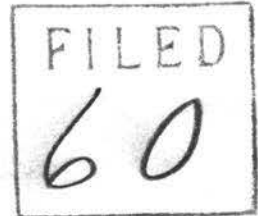
APPROVED:

J. E. TAYLOR 
Attorney General

JRB:ml

(Previous opinion #124 answered by letter dated April 21, 1948.)

TAXATION: Where county assessor resigned before May 31st and did
ASSESSORS: not make verification of assessor's books, and successor
did not qualify until June 10th, verification by affidavit
of assessor's books is not required to make valid
assessments.



June 15, 1948

6-16

Honorable Emory L. Melton
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting
an official opinion of this department and reading as follows:

"The County Assessor of Barry County re-
signed his office on the 20th day of May,
1948, such resignation being accepted on
the 21st day of May, 1948. At that time
the Assessor's books were completed but
the verification required by Section
11000.38, Mo. R. S. A., had not been at-
tached thereto.

"Subsequent to the resignation mentioned
above, the Governor appointed a successor,
who qualified and took over the office on
the 10th day of June, 1948. In these cir-
cumstances, your official opinion is re-
quested upon the following questions:

"1. May the prior Assessor, who in fact
compiled the Assessor's books and made the
assessments for the year 1948, verify such
books in accordance with the requirements
of Section 11000.38, Mo. R. S. A.?

"2. If such prior Assessor may not so
verify said books, may the successor and
now incumbent Assessor make such verifica-
tion under the above-mentioned statute or
any other applicable one?"

Section 11000.38, Mo. R. S. A., provides that the county assessor shall make out and return to the county court, on or before the 31st day of May in every year, a fair copy of the assessor's book, verified by his affidavit, and sets out the form of the affidavit.

In the case of State ex rel. v. Timbrook, 240 Mo. 226, the Supreme Court held that the requirement of such section regarding the verification by affidavit of the assessor's book is merely directory, and that the failure of the assessor to verify by affidavit such book does not invalidate assessments in such book. The court said, l. c. 238-239:

"Section 11521, Revised Statutes 1909, provides: 'No irregularity in the assessment roll, no omission from the same, nor mere irregularity of any kind in any of the proceedings, shall invalidate any such proceeding.'

"The same legislative power which provided for the assessor's affidavit, has also provided that the 'omission' of such matters shall not invalidate the tax; in other words such provision for an affidavit is directory.

"The mere absence of the affidavit to the assessor's book should not in this case invalidate the tax sued for. By section 11344 the assessor is required, on entering office, to take an oath in substance the same as that required in the affidavit to the assessor's book, and the presumption is that he took that oath. Section 11403 requires the assessor and the other members of the board of equalization to take an oath 'fairly and impartially to equalize the valuation of all the taxable property in such county;' and it is presumed they took that oath in this case.

"The board of equalization had power to raise or lower the valuation of all the property on that book on a percentage basis. (Black v. McGonigle, 103 Mo. 193.) It could add to the book property which the assessor had omitted, and drop from it property which he had placed thereon, and could raise or lower the value of any item of property on that

book. Any citizen had the right to be heard on any such questions. The functions of this board and the time of their meeting are generally known to the citizens; and it is a matter of common knowledge that many people attend the sessions of the board.

"The record in this case shows the action of the board by which the assessment of the county was finally completed and equalized. After such reconsideration of the assessor's book by the board of which the assessor was himself a member, surely the absence of the affidavit from the assessor's book as returned to the county court should not invalidate the assessment, especially in view of the curative statutes."

In view of the authority contained in the above-quoted case, we believe it unnecessary to rule as to whether or not the prior assessor or the present assessor has any power to verify the assessor's book.

CONCLUSION

It is the opinion of this department that where a county assessor resigns his office before verifying by affidavit the assessor's book, and the successor assessor does not qualify and take office until the month of June, it is unnecessary to have a verification by affidavit of the assessor's book.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

J.B.

CBB:HR

ELECTIONS: At a general election a voter may "write in" the name of any person he chooses for any office he chooses without regard to whether or not there is a regular party nominee. The person receiving the majority vote for any particular office is the person elected to said office.

September 28, 1948



Honorable Emory L. Melton
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Melton:

Your opinion request of recent date reads as follows:

"Under MRSA 1939, Section 11603, a voter may if he desires, vote for a candidate whose name does not appear on the printed ballot by drawing a line through the printed name of the regular candidate and write below such cancelled name the name of the person for whom he desires to vote, placing a cross in the square to the left of such name.

"As you will note from the enclosed ballot, there is only one candidate for Probate Judge. Could the voters fill this office in the manner provided for above? If so, would a simple majority of the votes elect the 'write in' candidate?

"Also, what would be the effect of a 'write in' candidate if the regular candidate had his name taken off the ballot?

"I shall appreciate your opinion on this matter at the earliest possible date."

As we understand your question, specifically you inquire whether or not it is possible for a voter to "write in" a person of his choice, and whether or not it is possible to so elect such person to office.

Section 11603, R.S.Mo. 1939, provides specifically as follows:

"* * * If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name.
* * *"

This section, in its essentials, has been on the statute books of Missouri since 1889, and, as you see, it provides for a voter to place upon the ballot the name of a person other than the regular party nominee should said candidate not appeal to him. The obvious reason behind this statute is that it is an attempt to prevent the disenfranchisement of a voter should the primaries or conventions used to nominate the candidates for office be subject to fraud or coercion or any other force which might destroy the free exercise of the right to vote by any and all persons. In 1892 the Supreme Court, en banc, in the case of Bowers v. Smith, 111 Mo. 45, 1. c. 52, 53, passed upon Section 4773, R.S. Mo. 1889, (Now Section 11595, R.S. Mo. 1939), which section, as now, establishes the form of ballot to be used in the elections. In construing that section of the law, the court stated:

"* * * Nominations under it entitle the nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there.

"The statute recognizes this right by requiring sufficient blank space for such writing, next to the printed names of candidates for each office. Revised Statutes, 1889, sec. 4773.

* * * * *

"* * * In Missouri any voter may add such a name for himself in the blank provided on the ballot for that purpose."

Further judicial support for the proposition that a voter at the general election may "write in" the name of any person

he chooses, regardless of whether or not there is a party nominee for that particular office, is found in the case of Bradley v. Cox, 271 Mo. 438, l. c. 448, 449:

"* * *Section 5900 provides that the voter, upon receiving the ballot, shall immediately retire to one of the booths in the polling place and that 'he shall prepare his ballot by selecting the ballot he desires to vote. He shall erase or strike out the name of any candidate he does not wish to vote for and write the name of his choice underneath.'"

Even in the dissenting opinion, l. c. 454, the court acknowledged the right of any voter to "write in" the name of his choice at the election. The court stated:

"* * *No authority in law for his name there in print, can be found. The only way it could have legally gotten on the ticket of any voter, was by the voter writing it in the space left under the caption and under the name of the nominee. * * *"

We, therefore, think it clear and obvious that, under the present statute and under the past decisions of this state, a voter may "write in" the name of any person he chooses at the time of the election. And as long as this situation exists there can be no disenfranchisement of the voter or no compulsion to accept a nominee distasteful to him.

We are enclosing a copy of an opinion rendered by this department under date of September 23, 1944, to the Honorable Arthur U. Goodman, Prosecuting Attorney of Dunklin County, which is in accord with this opinion.

Hon. Emory L. Melton

-4-

CONCLUSION

We are of the opinion that at a general election a voter may "write in" the name of any person he chooses for any office he chooses without regard to whether or not there is a regular party nominee. Further, that, under our system of elections, the person receiving the majority vote for any particular office is the person elected to said office.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WCB:LR
enc

ELECTIONS:

Canvass to be made after all intermediate registrations as provided for in Section 11872 of the Revised Statutes of Missouri for 1939, discretionary with the Board of Election Commissioners.

January 6, 1948



Honorable John W. Mitchell
Secretary, Jackson County
Board of Election Commissioners
Court House
Independence, Missouri

Dear Sir:

This will acknowledge receipt of your letter of December 12, 1947, in which you request an opinion of this department. Omitting caption and signatures, your opinion request reads as follows:

"The Board of Election Commissioners desire an opinion and request your office to furnish same. We refer to Section 11860, Section 11869 and Section 11872 under Registration Elections - Counties of 150,000 or more. We are confronted with this problem and the question is this. Is it necessary for our Board, after having an intermediate registration under Section 11872, to follow it with a clerks' canvass under Section 11869? It will be noted that Section 11860 provides for a general registration and after said general registration a clerks' canvass shall be made, but Section 11872 or Sections thereafter do not provide for a canvass. This question has arisen, and we are in doubt as to whether or not we must have a canvass. Our Board is planning for a registration for a special city election January 6, 1948 preceding the election on January 27, 1948.

"We would appreciate your opinion as soon as possible."

Honorable John W. Mitchell

Article 17, Chapter 76, of the Revised Statutes of Missouri for 1939, provides for the registration of voters in counties of over 150,000 population. In such article and chapter is found Section 11860 which provides in part as follows:

"The Board of election commissioners and said judges and clerks shall constitute the board of registry and the judges and clerks of each precinct shall first meet under direction and control of the board of election commissioners in their respective precincts on Tuesday, five weeks before the next state, primary or general, election at the places designated by the board of election commissioners and then proceed to make a general registration of all voters in their respective precincts. The second day of registration being on Saturday following and the third day Tuesday, three weeks before such election. A general registration shall be made by the board of registry in every year thereafter in which a presidential election occurs and just prior thereto the first day of such registration being on Tuesday, four weeks before such election and the second day of such registration the Saturday following and the third day Tuesday three weeks before such election:*****
*****."

As can be seen from the above statute, the registration of such voters pertains to the general registration which is to be held with the exception of first registrations in the year in which presidential elections occur.

Another pertinent provision of the Missouri Statutes, to-wit: Section 11872, Revised Statutes of Missouri for 1939, provides for an intermediate registration. This Section provides in part as follows:

"The board of election commissioners may from time to time, as in the judgment and discretion of the board may seem necessary cause such intermediate registration to be made in such manner and form as to said board may be deemed advisable. Said board of election commissioners may require the judges and clerks to make such intermediate registration in the

Honorable John W. Mitchell

various precincts in said county or the board of election commissioners as a board of registry may hold sessions in each township in said county for the purpose of making an intermediate registration, said board of election commissioners acting as judges the clerks of said board of election commissioners acting as registry clerks."

The preceding section of the statute authorized the Board of Election Commissioners in counties such as yours to call intermediate registrations whenever it is deemed advisable by the Board.

Another section of the Revised Statutes of Missouri for 1939 which pertains to the question raised in this opinion is Section 11869, wherein provision is made for a canvass of the voters after registration has been completed. This Section of the Statute proscribed in part the following:

"The clerks of election are hereby constituted canvassers of the precincts of which they are appointed; and upon the Thursday and Friday following the last day or registration, if so much time shall be required, the said two clerks, shall each having one of said verification lists, go together and canvass the precinct calling at each dwelling place as indicated upon said verification lists, and if they shall find that any person upon their verification lists does not reside at the place designated thereby, they shall make a check mark, or cross (X), opposite any such name. If, in making any such canvass, any person shall refuse to answer questions and give the required information asked for and known to him or her, such person shall be deemed guilty of a misdemeanor under this article and shall be liable to a penalty not to exceed \$50.00 *****."

It is apparent from the preceding provision of the statute that the canvass therein provided for by the Legislature is for the purpose of checking the addresses of the persons previously registered in the various precincts in order that illegal voting can be prevented. This being true, it seems reasonable that such a safeguard should be in effect with reference to both the regular registrations as provided for in Section 11860, Supra, and the

Honorable John W. Mitchell

intermediate registrations provided for under Section 11782, Supra. It does not seem reasonable to this department that it would be the intention of the Legislature in passing the above statutes that there should be a safeguard in the form of a canvass for one registration and there should be no such canvass for the other.

Our research does not reveal that there have been any decisions on these particular sections of the statutes and therefore we must look to the intention of the Legislature in construing them.

The original statutes providing for registrations of counties of the population of over 150,000 were passed in 1917 as a complete unit, at which time such legislation was known as Senate Bill No. 528, Section 23 in such Senate Bill provides as follows:

"Intermediate Registration provided for --
At every election held in such county, between the general registration above referred to, the last general registration shall be used; but the same shall be revised by the board of registry of each precinct where such election is to be held; and, for the purpose, the board of registry shall meet on Tuesday four weeks preceding such election and shall hold a session from eight o'clock a.m. until nine o'clock p.m. on that day; and names may be added to the registers in the same way; upon sworn application, as in the case of a general registration; and all the other forms and requirements are to be observed as provided with reference to general registrations, both as regards the canvass after the registration, the revision of the registration, and otherwise."

As can be seen from the above provision, the canvass was to apply to the intermediate registration as well as to the regular registration.

In the Revised Statutes of Missouri for 1919, the preceding provision remained the same but in 1921, the Legislature repealed all of the provisions relative to registrations in Counties of the size involved, and enacted in lieu thereof thirty-seven new sections of the Statute.

Honorable John W. Mitchell

As can be seen from such provision all reference to a canvass after an intermediate registration has been omitted. The obvious intention of the Legislature at the time the original provisions were passed was that there should be a canvass made not only after the regular registration but also after any intermediate registration.

However, we again refer you to Section 11872, Supra of The Revised Statutes of Missouri for 1939 and call attention to the first sentence of such provision which prescribes the following:

"The Board of Election Commissioners may from time to time as in the judgment and discretion of the Board may seem necessary, call intermediate registrations to be made in such manner and form as to said board may be deemed advisable *****."

The Courts of this State have held that Legislative action must be construed according to the purpose of it's enactment. State vs Toombs, 25 SW (2) 101, 324 Mo. 819. It has further been held that in construing statutes that evils sought to be remedied and benefit intended to be conferred thereby should be considered. See Dodd vs Independent Stove and Furnace Co. 51 SW (2) 114, 330 Mo. 662.

It seems apparent from the above statement that the Legislation of this State intended that the advisability of making a canvass after an intermediate registration should be discretionary with the board and this Department feels that if in the discretion of the board they deem it advisable that a canvass be held after an intermediate registration that the board has the authority to order such canvass.

CONCLUSION

Therefore, it is the opinion of this Department that whether a canvass shall be held after intermediate registration has been held pursuant to Section 11872 of the Revised Statutes of Missouri for 1939 is within the Board of Election Commissioner's discretion.

Respectfully submitted,

APPROVED:

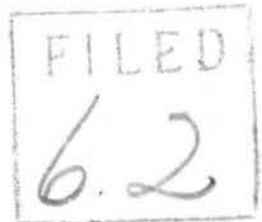
JOHN S. PHILLIPS
Assistant Attorney General

J. E. TAYLOR
Attorney General

*Copy to
J. Smith*

COUNTY COURT: County court may not pay county clerk compensation
COUNTY CLERK: for acting as agent for county in making contracts
under the King-Thompson road bill.

January 15, 1948



Honorable Harold L. Miller
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the following statement:

"Request that I be furnished with an opinion as to whether or not the County Court would be authorized to order additional expenditure as payment to the County Clerk, in addition to his salary for duties in connection with the County Aid Program, as provided for in C. S. for H. B. 214, by appointing the County Clerk as agent for the county to make contracts on behalf of the county, as provided in Section 13766, R. S. of Missouri, 1939, in view of the duties imposed upon the County Court and necessarily their Clerk by Section 4 of said Bill."

DeKalb County is a county of the third class, and the law fixing the salary of the county clerk of such counties is found in Laws of Missouri, 1945, page 1544.

Committee Substitute for House Bill No. 214, referred to in your request, is found in Laws of Missouri, 1945, page 1471. Section 4 of that bill, which relates to the subject of your inquiry, is found on page 1503, and reads as follows:

"The county court of each county desiring to avail itself of the benefits of this Act shall, with the advice and assistance of its county highway engineer, or if none, of its county surveyor, formulate a program for the improvement, construction, reconstruction or restoration of county roads, as provided for in this Act, for the period for which funds are appropriated for the County Aid Road Fund. Such program, together

with specific plans, specifications and estimates for each project included in said program, shall be submitted to the State Highway Commission for approval, within the period for which the funds are appropriated to the County Aid Road Fund. If such program and the plans, specifications, and estimates for each project submitted, comply with the provisions of this Act and with the general plans, specifications and requirements formulated as provided in this Act, the same shall be approved by the State Highway Commission, and it shall so notify the State Auditor and the State Treasurer, who shall thereupon set aside from the share of the County Aid Road Fund apportioned to such county, an amount of said fund on account of each project included in said program, which amount so set aside shall not exceed fifty per cent (50%) of the total costs of such project, and in no event shall exceed the sum of Seven Hundred Fifty Dollars (\$750.00) per mile of the county road included in such project. No part of the County Aid Road Fund shall be used for acquisition of right-of-ways."

Referring to this section, it will be found that the county highway engineer is supposed to advise and assist the county court in formulating a program under this bill. There is nothing in this section which refers to the county clerk or his duties in connection therewith. Under Section 5 of this bill, Laws of Missouri, 1945, page 1474, the county court is authorized to contract for road improvement. This section reads as follows:

"Upon compliance with the provisions of the foregoing section, the county court shall thereupon, or at such times as it shall determine, publicly advertise for sealed bids for each of the projects included in its approved program. The contract for each project shall be awarded to the lowest and best bidder; provided that the county court may reject any and all bids. In asking for bids and awarding such contracts, the county court may combine one or more of the approved projects

in one contract. In the event that no bids are received, or in the event that such bids are in excess of the estimate of cost thereof as prepared by the county highway engineer, the county court, the special road district, or the township board in those counties having township organization, may perform the work provided for in the specifications, provided, however, that the amount to be paid from the County Aid Road Fund shall in no event exceed fifty per cent of the estimate of cost prepared by the county highway engineer, or the sum of \$750.00 per mile, whichever sum is less."

This section does not authorize the county court to appoint an agent to enter into contracts for road improvement. However, Section 13766, R. S. Mo. 1939, referred to in your request, does authorize county courts to appoint agents to make contracts on its behalf.

Referring to said Sections 4 and 5, supra, it will be seen that the county court does have duties to perform in carrying out the program under this act, and naturally, there are additional duties imposed on the county clerk as a result of these duties being imposed on the county court. However, since the lawmakers have not made any provision for compensation for this work, either to the county court or the county clerk, then there would be no authority to pay them out of public funds for these services.

In the case of *Modaway County vs. Kidder*, 129 S.W. (2d) 857, 860, the court applied this principle in the following language:

"The general rule is that the rendition of services by a public officer is deemed to be gratuitous, unless a compensation therefor is provided by statute. If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too must be strictly construed as against the officer. * * *"

It appears from your request, however, that there is no claim that the county clerk is entitled to additional compensation for these added duties, but you inquire whether or not

it would be legal to appoint the clerk as agent for the county court to make contracts under the road bill for the county court. Even if the county court were authorized to appoint and compensate the county clerk for the aforesaid purposes, such compensation could not be for services which the clerk performs under the act as county clerk. In other words, the only compensation, if any, which could be paid would be for making the contract.

Again referring to Section 5, supra, it will be seen that the county court lets the contract to the lowest and best bidder, and that it may reject any and all bids. In the performance of this duty, the court exercises a discretionary function and this could not be delegated to the clerk as agent of the court. This principle is announced in 15 C.J., page 465, Section 116, as follows:

"The right of a county board to delegate its authority depends on the nature of the duty to be performed. Powers involving the exercise of judgment and discretion are in the nature of public trusts and cannot be delegated to a committee or agent. Duties which are purely ministerial and executive and do not involve the exercise of discretion may be delegated by the board to a committee or to an agent, an employee, or a servant. * * * "

Said Section 13766, R. S. Mo. 1939, does authorize the county court to appoint an agent to make contracts on its behalf. However, such appointment would only confer on such an agent a ministerial duty and he could not perform discretionary duties for the court.

Even though the court should appoint the clerk as its agent to make the contract, we do not think under the circumstances that the court would be authorized to compensate him for this service. We make this statement because the statute does not expressly provide for compensation, and we do not think the duties are such that compensation would be implied. In the case of *Blades vs. Hawkins*, 240 Mo. 187, the court had before it for consideration the question of the authority of the county court to employ expert accountants to examine the accounts of the county officers. The examination of the officers by these accountants showed that the county officers were in default some \$5,000 or \$6,000. In view of the technical nature of this work, the court held that the county court did have implied authority to employ and pay these accountants.

In speaking of authority of a county court to employ and pay agents, the court said, l.c. 195:

"The more important proposition, and the one chiefly controverted, is as to the power of the county court to employ an expert accountant to audit the public records and the accounts of present and prior officials. Its power to do so must be found in some express statutory grant, or else implied as essential to the proper execution of powers expressly granted or duties expressly imposed. Section 6759, Revised Statutes 1899, prohibits counties and other municipal bodies from making any contracts not within the scope of the powers of the municipality or expressly authorized by law. This provision is but declaratory of the common law; for these public corporations never have been deemed to possess authority to contract, or do any other act, unless the power was granted by statute or could be implied because necessary and incidental to the due performance of powers granted or duties enjoined. This doctrine applies to county courts and commissioners, as well as to the governing bodies of other subordinate political corporations. (7 Am. & Eng. Ency. Law, sec. 789; Wolcott v. Lawrence Co., 26 Mo. 277; Sturgeon v. Hampton, 88 Mo. 204.) There is in our statutes no grant of authority to a county court to employ an expert to audit and examine the books and accounts of the county and its officers. Hence, if this authority existed in the present instance, it was because the law implied it as essential to the due exercise of powers specifically vested in the county court by statute or the performance of a duty specifically required of said tribunals. The courts are conservative in implying powers not expressly given. One limitation imposed by law on these implications is that no power will be implied to belong to a public corporation unless it is cognate to the purpose for which the corporation was created. * * * "

The Hawkins case, supra, however, differs from the case here because in that case, the duties performed by the agents were of a technical nature and required special talent and skill, while in the case here under consideration, the county clerk or any other person appointed as agent would only have to perform a ministerial function in making the contract. That being the case, under Section 13766, supra, the county court might appoint the clerk or any other person to make the contracts provided for in said Section 5 of the act. However, since no provision for payment of such agent for this service is made, under the statute, we do not think the court would have implied power to pay out public funds for this purpose.

CONCLUSION

From the foregoing, it is the opinion of this department that the county court may appoint the county clerk or any other person as agent to enter into contracts for road improvement under said Committee Substitute for House Bill No. 214. We are also of the opinion, however, that the court would not be authorized to pay out any public funds for this service because the statute does not expressly provide for such payment and the duties are such that authorization for payment would not be implied.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

FILED
62

March 15, 1948

Miss Kathryn P. Mier
State Librarian
State Office Building
Jefferson City, Missouri

Dear Miss Mier:

We have your letter of recent date requesting an opinion from this department, which reads as follows:

"The Ray County Library Board, Richmond, submitted to me a copy of a petition filed with the Ray County Court, requesting an election to determine whether a Ray County Library District and a one-mill tax shall be retained in Ray County.

"A copy of the petition is enclosed. The Revised Statutes of Missouri, 1939, Chapter 110, Article 6, Section 14767, provides for the establishment of a County Library District and provides for a method of securing taxation for its operation and maintenance. This section also provides for the discontinuance of the tax. It is not clear to me that the section provides for the discontinuance of the County Library District.

"The petition submitted (copy attached) seems to embody two requests: (1) the abolition of the district, and (2) the abolition of the tax.

"In your opinion can a library district be abolished under the statutes of Missouri (Revised Statutes, 1939, Chapter 110, Section 14767)?

"Is the request to the Ray County Court worded in such language as to provide for an election on the questions submitted in the petition?"

The question presented is whether a county library district which has been established in accordance with Section 14767, R.S. Mo. 1939, can be dissolved under the provisions of that statute. Section 14767 provides:

"Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition or propositions of such petition; and said county clerk shall cause said proposition or propositions to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 11542, R.S. 1939. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned in said petition, and such county clerk shall make

and file in his office, return of service of such notice; and every voter within such proposed county library district may, in his proper district, vote

'for establishing --- county library district,'

or

'against establishing --- county library district,'

and may vote

'for --- mills tax for a free county library,'

or

'against --- mills tax for a free county library:'

Provided, that in case the boundary limits of any city or town hereinabove mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district. And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'for establishing --- county library district,'

and for the tax for a free county library,

the county court shall enter of record a brief recital of such returns and that there has been established

'--- county library district,'

and thereafter such

'--- county library district'

shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. The proceeds of such levy, together with all interest accruing on same, with library fines, collections, bequests and donations in money shall be deposited in the treasury of the county and be known as the 'county library fund,' and be kept separate and apart from other moneys of such county, and disbursed by the county treasurer only upon the proper authenticated vouchers of the county library board hereinafter mentioned: Provided, that such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district."

It is provided that whenever one hundred taxpaying citizens of the county, outside the cities and towns now maintaining a public library, petition the county court, asking that a county library district be established and an annual tax be levied for such purpose, said propositions shall be submitted to the voters of such proposed district. If the majority of the votes cast are in favor of such propositions, a library district shall be considered established, which shall be a body corporate. The tax specified shall be levied and collected in the same manner

as other taxes in rural school districts in the county, subject to the further provisions of Section 14767. It is further provided that such taxes shall cease if the voters of the district so determine by a majority vote at an election held for that purpose and in the same manner as the election to establish such district was held.

In construing Section 14767 we must, of course, look to the intent of the Legislature. *Metropolitan Life Ins. Co. v. Scheuffler*, Mo. Sup., 180 S.W. (2d) 742. The lawmakers intent is to be ascertained from the language used; it must be given its plain and rational meaning in order to promote its manifest purpose. *Donnelly Garment Co. v. Keitel*, 354 Mo. 1138, 193 S.W. (2d) 577; *Haynes v. Unemployment Compensation Comm.*, 353 Mo. 540, 183 S.W. (2d) 77; *Wallace v. Woods*, 340 Mo. 452, 102 S.W. (2d) 91. It is further provided in Section 14767 that "such taxes shall cease, in case the regular voters of any such district shall so determine by a majority vote at any annual election held therein, after petition, order of court, and notice of such election and of the purpose thereof, first having been made, filed and given, as in the case of establishing such county library district." (Underscoring ours.)

It is clearly indicated by the provision that the tax voted shall be levied and collected in the same manner as other taxes in rural school districts in the county, subject to the further provisions of the statute that the above proviso relates only to the abolition of the library tax. In no sense can said proviso mean that an election to discontinue the county library tax includes the proposition to dissolve the county library district. It is obvious that the terms of the statute are plain and unambiguous. We may not search for a meaning beyond the statute itself. *State v. Phillips Petroleum Co.*, 349 Mo. 360, 160 S.W. (2d) 764. Where the language of a statute is plain and unambiguous it may not be construed but must be given effect as written. *St. Louis Amusement Co. v. St. Louis County*, 347 Mo. 456, 147 S.W. (2d) 667; *Cummins v. Kansas City Public Service Co.*, 334 Mo. 672, 66 S.W. (2d) 920; *State v. Thatcher*, 338 Mo. 622, 92 S.W. (2d) 640.

Even though in an election for that purpose under the provisions of Section 14767 the county library tax is discontinued, this does not automatically dissolve the county library district for the reason that the district is, in the first instance, a creature of the law and after once having been created in compliance with the law and once having procured

Miss Kathryn P. Mier

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its corporate life from the state, this corporate life cannot be taken away unless such is done in compliance with the law. There is no provision contained in Section 14767 which authorizes the dissolution of a county library district.

It necessarily follows then that the petition attached to the letter of request should be amended in accordance with the conclusion reached herein.

Conclusion.

Therefore, it is the opinion of this department that a county library district established in accordance with Section 14767, R.S. Mo. 1939, cannot be dissolved under the provisions of that section.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JTB*
Attorney General

DD:ml

COUNTY BUDGET:

Appropriation for Ripley County Farm Bureau, ordered to be made by Circuit Court, should be included in Class 4 of budget, and if there are insufficient funds in Class 4 to pay all approved estimates of said class, such funds should be apportioned to each office in proportion to the approved estimates of each office in Class 4. County Court cannot reduce estimated expenditures for Circuit Court expenses below 1946 and transfer such amount to Class 4 for County Farm Bureau.

April 23, 1948

FILED

62

4-27

Honorable Leo Mitchener
County Clerk
Ripley County
Doniphan, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"Attached is a certified copy of order made today by the Ripley County Court. I would like your opinion as to my liability on my official bond if I issue warrants on this amended budget. Will I in any way endanger myself by issuing warrants for the amount and for purposes not originally set up in the budget, in view of the holdings of the Courts that the budget cannot be amended or changed after it is once made up at the first of the year?"

The certified copy of the order you refer to in your opinion request is an order of the County Court of Ripley County stating that in the 1948 budget \$1500 was appropriated in Class 2 for Circuit Court expenses; that no appropriation was made for the Ripley County Farm Bureau; that as a result of a mandamus suit in the Circuit Court, the Circuit Court ordered the County Court to make an appropriation of \$1000 for the Ripley County Farm Bureau, and the County Court, in its order, transferred \$1000 from the appropriation in Class 2 for Circuit Court expenses to Class 4 for the use and benefit of the Ripley County Farm Bureau.

Section 5, Laws of Missouri, 1945, page 100, provides that the county's share of the cost of carrying on cooperative extension work in agriculture and home economics shall be included by

the county court in Class 4 for such year in counties budgeting the county expenditures by classes. Therefore, the order of the Circuit Court, requiring the budgeting of \$1000 for the County Farm Bureau, properly places such sum in Class 4.

Section 10914, R. S. Mo. 1939, provides that the county court shall show the estimated expenditures for the year by classes, and places in Class 2, among other things, the expense of conducting circuit court. Such section further provides that the estimate in Class 2 shall not be less than the last preceding even year in even years and last preceding odd year in odd numbered years. Therefore, the budget for Class 2, in 1948, cannot be less than that for the year 1946.

Section 10911, R. S. Mo. 1939, provides that the Class 2 expenditures, consisting in part of the cost of holding circuit court, shall constitute the second obligation of the county, and that all proper claims coming under the second class shall have priority of payment over all except Class 1.

Section 10914, supra, provides under subsection Class 5 that the county court may transfer any surplus funds from Classes 1, 2, 3 and 4 to Class 5 to be used as contingent and emergency expenses. Since this is the only provision for transferring funds from Class 2, and it presupposes also an actual surplus, it is our opinion that funds cannot be transferred from Class 2 to Class 4.

If there are funds budgeted in Class 5 of the budget, which is the contingent and emergency expense class, then warrants on said Class 5 should not be paid until the entire amount budgeted in Class 4, including the \$1000 for the County Farm Bureau, have all been paid, since those statutory expenditures in Class 4 have priority over the discretionary expenditures in Class 5.

In the case of Gill v. Buchanan County, 142 S. W. (2d) 665, the court held that the full pay of a county judge was by law made a part of the county budget, whether or not such pay was included by the members of the county court in the budget. The order of the Circuit Court of Ripley County in ordering the payment by the County to the County Farm Bureau of the \$1000, by force of law, includes such expenditure in Class 4 of the budget.

Section 10912, R. S. Mo. 1939, provides, in part, as follows:

" * * * If for any year there should not be sufficient funds for the county court to pay all the approved estimates under class 4, after having provided for the prior classes, the county court shall apportion and appropriate to each office the available funds on hand and anticipated, in the proportion that the approved estimate of each office bears to the total approved estimate for class 4."

Therefore, if there are insufficient funds in Class 4 of the budget, when the \$1000 which was transferred to such Class 4 is retransferred to Class 2, where it belongs, to pay all expenditures budgeted under such Class 4, the available funds in Class 4 should be apportioned to each office in the proportion that the approved estimate of each office bears to the total approved estimate for Class 4.

CONCLUSION

It is the opinion of this department that the County Court has no power to transfer funds from Class 2 of the budget to Class 4 to pay for the county's share of the cost of the County Farm Bureau, when such payment by the County is ordered by the Circuit Court.

It is further the opinion of this department that if there are insufficient funds in Class 4 of the county budget to pay all claims in such class, the County Court shall apportion and appropriate to each office the available funds in Class 4, in the proportion that the approved estimate of each office bears to the total approved estimate for Class 4.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

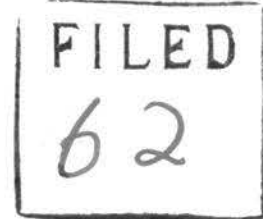
APPROVED:

J. E. TAYLOR
Attorney General *JB*

CBB:HR

COUNTY LIBRARY: Qualified voters of a city having a tax-supported free library may not vote on the question of becoming a part of a free county library system at the same time the county votes on the establishment of a county library system.

May 20, 1948



Miss Kathryn P. Mier
State Librarian
State Office Building
Jefferson City, Missouri

Dear Miss Mier:

This is in reply to your letter of recent date in which you request an opinion of this department, which is in words and figures as follows:

"Revised Statutes of Missouri, 1939, Chapter 110, Article 6, Sections 14767 and 14771, provide for the establishment of a County Library District, excluding cities and towns maintaining tax-supported libraries from voting or from additional county library taxes.

"Section 14772 provides that a city or town maintaining a library may, upon petition, submit to a vote a proposal to become part of the county library.

"Barry County proposes to vote on the establishment of a county library in April 1948. Monett and Cassville have tax-supported libraries, but the library boards of both towns have asked if, under the law, it would be possible for them to submit to the voters the question of becoming part of the county library at the same time the county votes?"

Your request goes into the question of whether or not a city, which has a tax-supported library, may submit to the voters of the city the question of whether or not it will become a part of the free county library system at the same time that the question of establishing a county library system is voted upon in the county in which such city is located.

Miss Kathryn P. Mier

County library districts are established under the provisions of Section 14767, R. S. Mo. 1939, which reads in part as follows:

"Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court asking that a county library district of the county, outside of the territory of all such afore said cities and towns, be established and be known as '_____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held the first Tuesday in April; and that the clerk of the county court shall cause to be published the proposition or propositions of such petition; and said county clerk shall cause said proposition or propositions to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in section 11542, R. S. 1939. Such order of court and such notice shall specify the name of the county and the rate of taxation mentioned in said petition, and such county clerk shall make and file in his office, return of service of such notice; and every voter within such proposed county library district may, in his proper district, vote

'for establishing-----county library district,'

or

'against establishing-----county library district,'

Miss Kathryn P. Mier

and may vote

'for-----mills tax for a free county library,'

or

'against-----mills tax for a free county library:'

Provided, that in case the boundary limits of any city or town hereinabove mentioned are not the same with the school district of such city or town, and such school district embraces territory outside the boundary limits of such city or town, then all voters, otherwise qualified and residing in such school district and outside the limits of such city or town, shall be eligible to vote on any proposition or matter of such library district, submitted to the voters at such election, and may cast a vote thereon, at the nearest and most convenient district schoolhouse within said county library district. And if, from returns of such election, which shall be certified to the county court, the majority of all the votes cast on such propositions at such election shall be

'for establishing-----county library district,'

and for the tax for a free county library, the county court shall enter of record a brief recital of such returns and that there has been established

' _____ county library district,'

and thereafter such

' _____ county library district'

shall be considered and held to be established, shall be a body corporate, and known as such; and the tax specified in such notice shall, subject to provisions herein below of this section, be levied and collected, from year to year, in like manner with other taxes in the rural school districts of said county. * * * * "

Miss Kathryn P. Mier

This section clearly provides that only the citizens of the county in the territory outside cities which have a tax-supported library may take part in the election to establish a county library.

Section 14772, R. S. Mo. 1939, sets out the procedure for cities which have a tax-supported library to become a part of the county library system. This section also provides that after the foregoing procedure has been followed, such town or city shall thereafter become a part of the free county library district. However, the proviso clause in this section seems to provide also that the question of such city or town becoming a part of the county library district shall be presented to the voters and the procedure for submitting this question is to be the same as is set out in Section 14767, supra, which is the procedure for establishing a county library district.

By a reading of all of said Section 14772, and taking into consideration the fact that the lawmakers have generally provided that the electors of any subdivision may have the privilege to determine by vote the policies thereof, we think the most reasonable construction of this statute is as stated above, that is, the electors of a city library district do have a right to determine by a vote whether or not the city district will become a part of the county library district.

The first clause of said Section 14772, is plain and unambiguous. It provides "after the establishment of a free county library, etc." The proposition for the city or town district to become a part of the county district must also be approved by the board of directors of the county district.

The directors of the county library board are appointed under Section 14768, R. S. Mo. 1939, which provides in part as follows:

"For the purpose of carrying into effect this article, in case a county library district is established and a free county library authorized as provided in section 14767 of this article, there shall be created a county library board which shall consist of five members, the county superintendent of schools and four other members to be appointed by the county court;
* * "

It will be noted that the county library board is not set up until the procedure for establishing the county library district

Miss Kathryn P. Mier

under Section 14767 has been followed. The city library district, which desires to become a part of the county library district, must wait until there is a board of directors of a county library district, which must approve the city's proposal to become a part of the county library district. Therefore, the city library district, having been required to submit its proposed annexation proposition to the county library directors, and since said Section 14772 provides that the officials of the city may become annexed to the county library system after the establishment of the free county library, then the city could not vote on the proposition of becoming a part of the county library system until the county library system had been established.

CONCLUSION

It is, therefore, the opinion of this department that the proposition of a city, which has tax-supported libraries, to become a part of the county library system, may not be submitted at the same time that the question of the establishment of a county library is submitted.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COUNTY FUND:

Money raised under tax levy by circuit court for erecting a jail must be deposited in county depository and cannot be invested in United States Government Bonds.

FILED

62

June 4, 1948

6-7
Honorable Edwin W. Mills
Prosecuting Attorney
St. Clair County
Osceola, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"On April 22nd, 1943, upon verified petition of the Prosecuting Attorney and the written request of the County Court, for an order of the Circuit Court directing the levy and collection of an additional tax of 10 cts. on the \$100.00 of assessed valuation of all taxable property in St. Clair County, for the purposes of acquiring a site and building a modern jail thereon:

"The Circuit Court found that the necessity for such additional tax existed and under the provisions of Sections 11040 and 11041, R. S. Mo. 1939, ordered the requested levy and collection.

"The Circuit Court also made an express order that none of such fund should be diverted or used for any other purpose.

"Thus has been accumulated in the County Treasury a 'jail fund' of nearly \$40,000 at this time. It is in the local bank - the County Depository - protected by the statutory bond, securities, etc.

"The County Court finds it inopportune to attempt the building of a jail at present, and realizes that the County could receive

more interest on this fund if it were invested in U. S. Government bonds. Is there any legal objection to such investment?

"The County Court has asked me to write your department for this opinion and will appreciate hearing from you on this question."

The general rule with regard to the powers of the county court is found in *Jensen v. Wilson Township*, 145 S. W. (2d) 372, where the Supreme Court said, l. c. 374:

" * * * A county court is only the agent of the county with no powers except those granted and limited by law, and like all other agents, it must pursue its authority and act within the scope of its powers. State ex rel. Quincy, etc., Ry. Co. v. Harris, 96 Mo. 29, 8 S. W. 794. * * * "

Article 9, Chapter 100, Mo. R. S. A., provides the statutory method for the selection of county depositaries where county funds are to be kept.

Section 13849, R. S. Mo. 1939, provides that the county court shall select the depositaries of all public funds of every kind and description, the deposit of which is not otherwise provided for by law.

In the case of *Boone County v. Cantley*, 51 S. W. (2d) 56, the Supreme Court said, l. c. 58:

" * * * A county is authorized to deposit its funds in county depositaries only. * * * "

In the case of *Halls County v. Commissioner of Finance*, 66 S. W. (2d) 115, the Supreme Court said, l. c. 116:

"Article 9, c. 85, R. S. Mo. 1929 (Mo. St. Ann. art. 9, c. 85, p. 6455 et seq.), makes it the mandatory duty of the county court to select depositaries in which the funds of the county shall be deposited, and provides in detail how such depositaries shall be selected and qualified. * * * "

Honorable Edwin W. Mills

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"A county has no lawful right to deposit county funds except in a county depository. * * *"

Since Article 9, Chapter 100, Mo. R. S. A., provides the statutory authority of the county court in dealing with county funds, and no special provision exists as regards the moneys raised by a special levy for the purpose of building a jail, it is our view that the moneys in such fund must be deposited in the county depositories and cannot be used to purchase United States Government Bonds.

CONCLUSION

It is the opinion of this department that moneys raised as a result of a levy ordered by the circuit court for the purpose of building a jail, and which are at present in such special fund, must be deposited in the county depositories, and the county court has no authority to purchase United States Government bonds out of the moneys in such fund.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

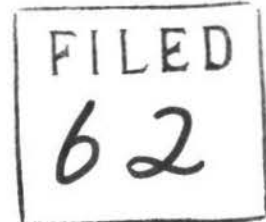
J. E. TAYLOR
Attorney General

JB

CBB:HR

OFFICERS: Section 10811, R. S. Mo. 1939, is not violated
PROFESSORS: by professors who assign the royalty payments
UNIVERSITY: to organizations whereby personal gain does not
inure to the professors.

June 11, 1948



Dr. Frederick A. Middlebush
President, University of Missouri
Columbia, Missouri

Dear Dr. Middlebush:

On April 9, 1948, this office rendered an opinion to the Honorable Howard B. Lang, Jr., Prosecuting Attorney of Boone County, Missouri, in which the conclusion was as follows:

"Therefore, it is the opinion of this department that a professor at the University of Missouri who accepts royalty checks from a publisher for books used in the University or one of its departments violates the provisions of Section 10811, R. S. Mo. 1939."

We are in receipt of your letter of May 27, 1948, embodying a request for an opinion as to whether or not certain proposed arrangements will exempt professor-authors of the University from the provisions of Section 10811, R. S. Mo. 1939.

The proposed arrangements may be said to be in two forms, one providing for the addition of a clause in presently existing contracts between the professors and the book publishers and, two, a clause to be inserted in future contracts which may be made between the professors and the book publishers. Inasmuch as the clauses have a similar legal effect, we will set out the pertinent portions for the purposes of this opinion as disclosed by Exhibit "A", an enclosure with your letter:

"In order to insure that I shall not be directly or indirectly interested in any sales of the book mentioned above for use in the University of Missouri, or any department thereof, I am writing to direct that, from and after the date hereof, you are to pay to

Dr. Frederick A. Middlebush

(Here will be inserted the name of the corporation, association or society which is to receive the payments. That corporation, association or society must be one which is organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net earnings of which inure to the benefit of any private stockholder or individual.) and all royalties now or hereafter due which would otherwise be payable to me under the terms of the contract mentioned above by virtue of any sales of said book which are made in the city of Columbia, Missouri by the Missouri Store Company and the Book Store of the University of Missouri. All remittances of such royalty payments are to be made by you direct to the payee just named above, and payment of such royalties as directed herein will serve as a full and complete discharge of your obligation to me as to any and all of such royalties so paid."

In your letter you state, "The proposed arrangements are the results of our efforts to attempt to make the results of faculty scholarship and research available to the students and staff of the University of Missouri while, at the same time, insuring that our professor-authors are not acting in violation of any of the statutes of the State of Missouri."

Section 10811, R. S. Mo. 1939, provides, in part:

" * * * if said curators, or any one of them, or the president or any professor, teacher or other officer or employee shall keep for sale or be interested in, directly or indirectly, the sale of any school furniture or apparatus, books, maps, charts or stationery used in said university or any department thereof, * * *"

In our opinion to Mr. Lang it was stated:

"When the professor receives a royalty check for books used in the University, it is our opinion that following the general rules as exemplified in the preceding cases he does have at least an indirect interest in the sale of books because of the pecuniary interest flowing to him in the form of royalty payments."

Dr. Frederick A. Middlebush

We are now confronted with the question of whether or not the proposed arrangements remove the indirect interest of the professor in the sale of the books because of the pecuniary interest flowing to him in the form of royalty payments.

In considering this problem it will be necessary to construe the application of Section 10811 to these arrangements. In the case of *Cummins v. Kansas City Public Service Co.*, 66 S.W. (2d) 920, the rule is stated, l.c. 925:

" * * * The primary rule of construction of statutes is to ascertain the lawmakers' intent, from the words used if possible; and to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning and to promote its object,
* * *"

Will the insertion of the contract provision, as set out above, be sufficient to remove the indirect interest which is forbidden by Section 10811? We believe that, since the effect of the provision will be to remove personal gain to the professor-author for the sale of books to be used in the University, the insertion of such a clause in the said contracts will be a compliance and not in violation of the Section 10811.

In the case of *Chadwell v. Commonwealth*, 157 S. W. (2d) 280, the court, in considering a "public officer contract," said, l.c. 283:

" * * * Nor are we impressed with the argument that the services the daughter renders the board are services in which the defendant was directly or indirectly interested. We are of the opinion the Legislature intended such interest to be confined to monetary considerations and that the consideration must be such as would move directly or indirectly to the board member himself, and not to include mere emotional interest that a member of the board might have in the person rendering the services. * * *"

In many other cases, involving "public officer contracts," which we have examined, the same general principle of law was evoked, that is, the interest that was forbidden was a monetary interest and not merely a sentimental or emotional interest.

Dr. Frederick A. Middlebush

We think it was the intent of our Legislature to forbid professors and others mentioned in Section 10811, supra, from using their position in the University for their personal monetary gain. The insertion of the words in the statute, "used in said university," shows that it was not the intention of the Legislature to absolutely forbid the authorship of books by professors and there is still available to them royalties to be derived from the sale of books used elsewhere.

By directing the publisher to make the royalty payments due for sales in the University to some religious, charitable, scientific or educational corporation, association or society, we believe that personal gain to the professor is thus removed from consideration. In these premises, there would not be a violation of Section 10811, R. S. Mo. 1939.

However, these organizations must not be a mere cloak or subterfuge to evade the law. We point this out because there could possibly be set up a method whereby the professor-authors would receive salaries or other modes of payment equivalent to their former royalties through these organizations and yet not part of the net earnings would inure to the benefit of any stockholder or individual. Compliance is possible through this method only if coupled with removal of personal gain.

CONCLUSION

Therefore, it is the opinion of this department that if a professor at the University of Missouri directs the publisher with which he has a contract to make royalty payments otherwise due the professor to some corporation, association or society organized and operated exclusively for religious, charitable, scientific or educational purposes, and that by so doing personal gain in the form of monetary consideration does not inure to the professor, there is not a violation of Section 10811, R. S. Mo. 1939.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AUCTIONEER:
REAL ESTATE BROKERS:

Auctioneer's license required to sell real estate at public auction, but licensed auctioneer not required to obtain real estate broker's license for such sales.

September 22, 1948

FILED

62

9-23

Honorable Roy C. Miller
Prosecuting Attorney
Webster County
Marshfield, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"I would appreciate very much an opinion from your office on the subject of the licenses required for the selling of real estate at public auction. I am particularly concerned with the question of whether one who sells real estate at auction is required to have the license required of auctioneers under Sec. 14912 Mo. R.S.A. as well as the license required for real estate brokers under Sec. 8300.1 Mo. R.S.A.? Also, can one who holds only an auctioneers license sell real estate without procuring a real estate brokers license?"

Chapter 116, Mo. R.S.A., Sections 14912 to 14936, deals with public auctioneers.

Section 14912, Mo. R.S.A. provides as follows: "No person shall exercise the trade or business of a public auctioneer by selling any goods or other property subject to duty under this chapter, or real estate, without a license."

Section 14915, Mo. R.S.A. provides as follows: "The licenses shall be under the seals of the respective county courts, signed by the clerk, and shall authorize the persons to whom granted to exercise the trade and business of auctioneers, by selling any property, real or personal, by auction within the county for the period of time specified in such license."

Section 14927, Mo. R.S.A. provides that land and leasehold interests sold at auction shall be free of duty, but there is no provision that a license as an auctioneer shall not be required for such sales.

Section 14936, Mo. R.S.A. provides that any person who violates any provision of the Act shall be guilty of a misdemeanor. A person who sells real estate at public auction without a license violates Section 14912, Mo. R.S.A. and would thereby be guilty of a misdemeanor.

In view of the foregoing provision we think it clear that a person who sells real estate at public auction is required under the above quoted sections to obtain a license.

As for your second question, the Missouri Real Estate Commission Act contains the following provision. "After January 1, 1942, it shall be unlawful for any person, copartnership, association or corporation, foreign or domestic, to act as a real estate broker or real estate salesman or to advertise or to assume to act as such without a license first procured from the Missouri Real Estate Commission." (Section 8300.1 Mo. R.S.A.)

Section 8300.3, Mo. R.S.A. provides that the Missouri Real Estate Commission Act shall not apply to any person who does not advertise or hold himself out to the public as a real estate broker or dealer and who might occasionally buy or offer to buy, or sell or offer to sell, any real estate.

Section 14915, Mo. R.S.A., quoted above, provides that an auctioneer's license shall authorize the person to whom it is granted to exercise the trade and business of auctioneer by selling any property, real or personal by auction. The business of public auctioneer has been recognized in this state since territorial times, the original law having been enacted December 6, 1820 (Territorial Laws, page 694) and having first appeared in Revised Statutes of Missouri in 1825 (page 161). It has remained a part of the laws of this state since that time. In view of the long standing recognition of the business of public auctioneer and of the fact that the public auctioneer's law specifically authorizes the licensee to sell real estate, we feel that the Legislature did not intend to include auctioneers who sell real estate at public auction within the Real Estate Commission Act. The business of a public auctioneer who sells real estate is of an entirely different nature from that of the real estate broker and we feel that the Legislature did not intend to require a duly licensed public auctioneer to secure an additional license from the Missouri Real Estate Commission in order to sell real estate at public auction.

As for your third question, a public auctioneer's license authorizes the holder to sell real estate only at public auction. Should the holder of such license engage in the business of real estate broker as defined in the Missouri Real Estate Commission Act (Section 8300.3 Mo. R.S.A.), which defines a real estate broker as follows: "A real estate broker is any person, copartnership, association or corporation, foreign or domestic, who advertises, claims to be, or holds himself out to the public as a real estate broker or dealer and who for a compensation or valuable consideration as whole or partial vocations sells or offers for sale, buys or offers to buy, exchanges or offers to exchange the real estate of others; or who leases, or offers to lease, rents or offers for rent the real estate of others; or who loans money for others or offers to negotiate a loan secured, or to be secured, by a deed of trust or mortgage on real property," he would thereby become subject to the provisions of that act and would be required to obtain a license thereunder.

CONCLUSION

This department is of the opinion that:

1. A public auctioneer's license is required under Section 14912, Mo. R.S.A. to be obtained by a person who sells real estate at public auction.
2. That a duly licensed public auctioneer is not required to obtain a license under the Missouri Real Estate Commission Act for the sale of real estate at public auction.
3. That a licensed public auctioneer who engages in the business of a real estate broker, as defined by the Missouri Real Estate Commission Act (Section 8300.3 Mo. R.S.A.) is required to obtain a license thereunder.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:mw

PENSIONS:- Probate court may waive statutory fees in guardianship proceedings for applicants or recipients of old age assistance.
PROBATE COURT:



June 11, 1948

Honorable John F. Moeckel
Judge of the Probate Court
Cape Girardeau County
Jackson, Missouri

6-14

Dear Judge Moeckel:

This will acknowledge receipt of your recent request for an opinion, which reads:

"The County Welfare office representative has discussed with me several times the matter of appointment of guardians and curators for people receiving old age assistance, whose mental condition has deteriorated to the point where they are considered unable to manage their business affairs. The question is, whether or not the Probate Courts can properly charge court costs in such cases.

"The local Welfare office just today talked with me about appointing a guardian for a woman here in Jackson who is on their rolls and receiving assistance. They inquired if court costs could be charged.

"Will you please let me have an opinion from your office as to whether or not the probate court may properly charge the statutory fees in guardianship matters involving payments to individuals of public funds by state agencies?"

Unless there is some specific exemption under the laws of this state for the payment of fees for proceedings in appointing such guardians, the Probate Court must charge regular statutory fees for such services.

The population of Cape Girardeau County exceeds 30,000 inhabitants. Section 13404, page 1517 to 1520, inclusive, Laws of Missouri 1945, prescribes the various fees that the probate court shall charge in proceedings appointing guardians and requires that the probate court shall charge such fees, and reads in part:

"In the probate proceedings in the different probate courts in this State, there shall be charged against and collected from the estates or parties requiring the services of the probate judge, clerk or court, fees, as follows:

* * * * *

"It shall be the duty of the judge and clerk of the probate court to charge upon behalf of the state or county as the case may be every fee that accrues for the services of such judge, clerk or court; except that in counties now or hereafter having more than 250,000 inhabitants the duty to charge such fees shall be imposed on the clerk of the probate court.

* * * * *

"In all counties which now or may hereafter have more than 30,000 inhabitants such fees shall be charged on behalf of the county and paid over to the county treasurer, who shall issue two receipts therefor, one of which shall be filed with the clerk of the circuit court having jurisdiction in such county. The reports herein above required to be made to the director of revenue shall be made to the county treasurer.

* * * * *

"Every judge and clerk of the probate court shall, before entering upon the duties of their respective offices, give a separate, good and sufficient bond which, in counties now or hereafter having the following number of inhabitants, shall be in a penal sum as follows:

* * * * *

"(2) in counties with more than 30,000 and less than 70,000 inhabitants, the sum of \$3000.00,

* * * * *

"Such bonds shall be approved by the clerk of the circuit court having jurisdiction in such county, and shall be filed with such clerk. Every such bond shall run to the state or county to which the fees herein provided for are payable and shall be conditioned respectively upon the faithful performance by such judge or clerk of each and every the duties hereinabove imposed upon such respective officer."
(Underscoring ours.)

By the Legislature's using the word "shall" instead of "may" in the foregoing section, under well established rules of statutory construction, it leaves no discretion with the probate court but is a mandate directed to him to charge and collect such fees. See State ex inf. McKittrick v. Wymore, 119 S.W. (2d) 941, 345 Mo. 98. Furthermore, the Legislature required the probate court and clerk of the court to enter into a separate bond for the faithful performance of their duties to run to the state or county, as the case may be, wherever said fees are payable. All of which clearly indicates that it becomes a mandatory duty upon the probate court to charge a fee for such services, unless there be some specific statutory provision exempting such cases from the foregoing Section 13404, supra.

We find under Section 9417, page 647, Laws of Missouri 1941, wherein the Legislature has left the matter of charging fees in such cases within the discretion of the probate court when, in the opinion of said court, such persons are unable to assume such expense. Section 9417, supra, reads in part:

"Benefits hereunder shall be delivered to the applicant in person or, in the event of his incompetency, to his legally appointed guardian, and in the case of a dependent child to the person or relative with whom he lives. All guardianship proceedings in the case of an applicant or recipient shall be carried out without fee or other expense, when in the opinion of the Probate Court, the aged person is unable to assume said expense. At the discretion of the court such a guardian may serve without bond.* * *"

CONCLUSION

Therefore, in view of Section 9417, page 647, Laws of Missouri 1941, we are of the opinion that regular statutory fees in guardianship proceedings for an applicant or recipient of old age assistance may be waived when, in the opinion of the probate court, such aged person is unable to assume such expense. However, this opinion only applies to applicants or recipients of old age assistance.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

T.B.

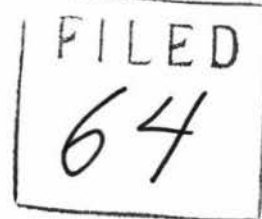
ARR:LR

CREDIT INSTITUTIONS
TAX ACT:
TAX RETURNS:

Tax returns under act must be filed on calendar year basis rather than fiscal year basis, and must be computed on basis of income for preceding calendar year.

February 5, 1948

Honorable M. E. Morris
Director of Revenue
Department of Revenue
State of Missouri
Jefferson City, Missouri



Dear Mr. Morris:

We have your recent letter, in which you request an opinion of this department. Your letter is as follows:

"It is requested that you please advise this department in a written opinion whether or not Credit Institutions may file a return and pay the tax as set forth in House Bill 948 as passed by the 63rd General Assembly on a fiscal year basis, or, is a calendar year basis mandatory."

House Bill No. 948 of the 63rd General Assembly, referred to in your above quoted letter, provides that the act thereby enacted shall be designated as the "Credit institutions Tax Act of 1946," and the act is set forth in Laws of Missouri 1945, pages 1937 to 1942.

Section 4 of that act provides as follows:

"Every taxpayer shall file a return with the Director on or before the first day of June in each year, beginning with the taxable year 1947. For the taxable year 1946 the return shall be filed on or before September 1, 1946. * * * "

Subdivision (c) of Section 3 of the act provides as follows:

"For the taxable year 1947 and each taxable year thereafter the tax shall be measured by the taxpayer's net income as hereinafter defined for the preceding calendar year."

Subdivision (d) of Section 2 of the act provides as follows:

"The term 'taxable year' means the calendar year in which the tax is payable."

Having these above quoted provisions of the act in mind, we direct your attention to the fact that, in view of the definition by the act of the term "taxable year," in which definition the term "taxable year" is defined as "the calendar year in which the tax is payable," it would be proper to read the portion of Section 4 of the act abovequoted as follows:

Every taxpayer shall file a return with the Director on or before the first day of June in each year, beginning with the calendar year of 1947. For the calendar year of 1946 the return shall be filed on or before September 1, 1946.

In view of this language, which, considering the above mentioned definition in the statute of the term "taxable year," expresses the meaning of this portion of the act, there can be no doubt that the tax for any given year is the tax for that calendar year rather than for the fiscal year in which the return date happens to fall, and that the return, therefore, is for the calendar year rather than for the fiscal year.

We further direct your attention to the fact that, in view of the provisions above quoted from Subdivision (c) of Section 3 of the act providing, in substance, that the tax for any given year is to be measured by the taxpayer's net income in the preceding calendar year, there can be no doubt about the proposition that the tax is also to be computed on the calendar year basis rather than on the fiscal year basis.

CONCLUSION

We are accordingly of the opinion that it is mandatory that the tax return contemplated by the act must be filed on

Hon. M. E. Morris

-3-

the calendar year basis rather than on the fiscal year basis, and we are further of the opinion that the tax provided for must also be computed on the calendar year basis, the computation being based upon the net income of the institution for the preceding calendar year.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW:LR

Copy
Mr. John

CONSTITUTIONAL LAW : Section 7, Article IX, Constitution of
AND SCHOOLS : Missouri, 1945, providing for distribution
: of liquidated county school fund refers to
: entire capital of fund.

March 22, 1948.

FILED

64

3-24

Honorable Roscoe E. Moulthrop,
Prosecuting Attorney
Harrison County,
Bethany, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request reads as follows:

"An opinion is respectfully requested of your office as to the construction of Article IX, Section 7, of the Constitution of 1945, with regard to the following provision, namely,

"Any county. . . by a majority vote of the qualified electors voting thereon may elect to distribute annually to its school the proceeds of the liquidated school fund, at the time and in the manner prescribed by law."

"In view of the fact that there appears to be no possibility of increasing the capital school fund of Harrison County, it would appear that the above constitutional provision applies only to interest, fines, penalties, etc., that may be distributed annually and not the principal sum of the school fund. It appears that if the principal sum of the capital school fund were intended to be distributed, by an election for that purpose, that this would not be an annual distribution as the fund would be paid out at one time, and there is no provision for any continuing source of revenue for the capital school fund after the effective date of the Constitution of 1945.

"The latter part of Section 10376 provides that the interest accruing from the re-investment of the county school fund, fines, penalties, etc., and all other money lawfully coming into said fund shall be

"... Distributed annually to the schools of the county as hereinafter provided in this article."

"As the only provisions provided thereafter in the article are those immediately following Section 10376, it again appears that the principal sum of the county school fund is not intended to be distributed, but that by an election provided for in Section 10376.2, the fines, penalties, forfeitures, etc., and all other money lawfully coming into the county school fund may be distributed annually to the schools of the county."

Section 7 of Article IX, Constitution of Missouri, 1945, reads in full as follows:

"All real estate, loans and investments now belonging to the various county and township school funds, except those invested as hereinafter provided, shall be liquidated without extension of time, and the proceeds thereof and the money on hand now belonging to said school funds of the several counties and the city of St. Louis, shall be reinvested in registered bonds of the United States, or in bonds of the state or in approved bonds of any city or school district thereof, or in bonds or other securities the payment of which are fully guaranteed by the United States, and sacredly preserved as a county school fund. Any county or the city of St. Louis by a majority vote of the qualified electors voting thereon may elect to distribute annually to its schools the proceeds of the liquidated school fund, at the time and in the manner prescribed by law. All interest accruing from investment of the county school fund, the clear proceeds of all penalties, forfeitures and fines collected hereafter for any breach of the penal laws of the State, the net proceeds from the sale of estrays, and all other moneys coming into said funds shall be distributed annually to the schools of the several counties according to law."

The provision for annual distribution of the liquidated county school fund is a new one, no such provision having been made in the Constitution of 1875 or the amendments thereto. The provision for annual distribution of penalties, forfeitures and fines is likewise new, Section 8 of Article XI, of the Constitution of 1875, as amended, having provided that such income should be added to the capital of the county school fund.

The Legislature has provided for elections in accordance with the constitutional provision above quoted. Sec. 10376.1 and 10376.2, Mo. R.S. Ann., Laws of Mo. 1945, p.876, Laws, 1947, p. 385. These provisions refer to the election as one to determine whether the capital of the liquidated school fund should be distributed annually. The Legislature has also provided for annual distribution of the proceeds of penalties, forfeitures and fines, without reference to an election. Sec. 10376, Mo. R. S. Ann., Laws, 1945, p. 1628. The constitutional provision quoted, together with the legislation adopted thereunder, refers, this office believes, to the capital of the county school fund and not merely to the penalties, forfeitures and fines. Inasmuch as the constitution and statutes now provide for annual distribution of penalties, forfeitures and fines, no election is required on that question.

In your letter you refer to the fact that if the constitutional provision covers the entire capital of the county school fund, all would be distributed in a single year and there could be no annual distribution. However, such would not necessarily be the case. Prior to the present constitutional provision, the county school fund was permitted to be invested in loans on real estate security. Sec. 10376, R.S.Mo. 1939. The present constitutional provision requires these investments to be liquidated without extension of time. Such loans cannot, of course, be collected prior to the time they become due, and generally a period of several years would elapse before all were paid. When collected, the amounts obtained would be required to be distributed annually instead of reinvested when distribution has been approved.

CONCLUSION.

Therefore, it is the opinion of this department that Section 7 of Article IX, Constitution of Missouri, 1945, providing for distribution of the liquidated county school funds, refers to the entire capital of said fund and not merely to penalties, forfeitures and fines.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR *JTB*
Attorney General

RRW/LD

TAXATION AND REVENUE: Method of computation of Missouri inheritance tax upon contingent remainders under Sec. 597, R. S. Mo. 1939, as amended, Laws 1943, p. 307.

April 15, 1948



Mr. M. E. Morris
Director of Revenue
Jefferson City, Missouri

Attention: Mr. C. L. Gillilan, Ass't Supervisor
In charge of Inheritance Tax

Dear Sir:

Reference is made to the request for an official opinion of this department made by Mr. C. L. Gillilan, Assistant Supervisor in charge of Inheritance Tax, Department of Revenue, based upon the facts set forth in a letter attached to such request, reading, in part, as follows:

"Re: Estate of Frances Darlington Faxon,
Jackson County, No. 58958

"I have been appointed inheritance tax appraiser by the Probate Court of Jackson County, Missouri, at Kansas City, in the above estate. I should like your advice with reference to the assessment of the tax.

"By the will of the above deceased, the residue, after a trust estate for the benefit of a daughter, 45 years of age, is divided into eight parts, to be distributed on the termination of the trust, as follows:

'(a) One-eighth thereof to my brother, Walter Darlington, if then living, but if he be not then living, to the heirs of his body, per stirpes and not per capita.

'(b) One-eighth thereof to the heirs of the body of my deceased sister, Helen Darlington Pugh, per stirpes and not per capita.'

"The provisions and situations with respect to the other six-eighths are similar to one or the other of the above.

"With respect to (a) above, Walter Darlington is living, but is older than the beneficiary of the trust. He has four living children, two of whom have two children, one has one child, and one has none. The attorney for the estate claims that under Sec. 597, R. S. Mo. 1939, as amended, Laws of Mo. 1943, p. 307, the tax should be assessed against the five grandchildren for the part that each will receive, and against the one child who has no children for the part she will receive.

"With respect to (b) above, the heirs of the body of Helen Darlington Pugh, deceased, at the time of the death of Frances Darlington Faxon, are three children, one of whom has seven children, one, three children, and one, no children. The attorney for the estate contends that the tax should be assessed against the ten grandchildren for the part each will receive, and against the one child who has no children for the part she will receive."

Section 597, R. S. Mo. 1939, was amended by an Act of the 62nd General Assembly, found Laws of Missouri, 1943, page 307. The portion thereof applicable to the matter under consideration reads as follows:

"Where any property shall after the passage of this article be transferred subject to any charge, estate or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase accruing to any person or corporation upon the extinction or determination of such charge, estate or interest, shall be deemed a transfer of property taxable under the provisions of this article in the same manner as though the person or corporation beneficially entitled thereto had then acquired such increase from the person from whom the title to their respective estate or interests is derived. When the property is transferred in trust or otherwise, and the rights, interest or estates

of the transferees are wholly dependable upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the lowest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executor, administrator, or trustee out of the property transferred: * * *

A comparison of the statute as it now reads with its form prior to the amendment mentioned discloses that the only change made by such amendment was the incorporation of the word "lowest" in lieu of the word "highest," appearing previously.

It is noted from the letter upon which the inquiry is based that the contention is made that the inheritance tax upon the contingent transfers made under (a) should be computed upon the basis of the grandchildren of the testatrix receiving all of the remainder. It is further noted that it is contended that a similar position is taken with respect to the transfers provided for in (b) thereof.

With these contentions, we are unable to agree. The statement of facts with respect to (a) discloses that the first taker, viz., Walter Darlington, is now living. The statement of facts further discloses that with regard to (b), three children of Helen Darlington Pugh are now living. In the premises, a presumption arises that such status will continue until the death of the holder of the life estate and the termination of the trust provided by the terms of the will. To this effect, see "Evidence," 31 C.J.S., par. 140, page 791; also, In re Person's Estate, 263 N.Y.S. 781, 147 Misc. 398, and In re Shupack's Estate, 287 N.Y.S. 184, 158 Misc. 873. In the first mentioned case the court declared that, in computing estate tax exemptions, the proper procedure was to assume that existing circumstances would continue and that a contingently vested interest would not be divested by death of the beneficiary prior to reaching the age when the principal of the trust fund was payable.

In view of this evidentiary presumption, it seems unreasonable that the inheritance tax should be computed upon the basis contended for. To do so would lead to speculation based upon the remote possibilities of the death of Walter Darlington, his four living children, and the three living children of Helen Darlington

Pugh. It is our thought that the presumption, first mentioned, of a continuance of the existing status is the more logical basis upon which such tax should be computed, and is more in accord with the legislative intent.

If such contingency should occur so that in fact the grandchildren, or some of them, do become the beneficiaries under the will, adequate provision for their protection against the imposition of a greater amount of inheritance tax than would be presently due has been made by further provisions of the statute under consideration. We direct your attention to the following proviso found therein:

" * * * Provided, further, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to any person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article. Such return of overpayment shall be made in the manner provided by section 584 of this article, upon the order of the court having jurisdiction.
* * * "

This proviso would have no meaning were a contrary construction given to the statute as a whole.

We have examined the case of *In re Shaw's Estate*, 175 S. W. (2d) 588, and find that it was decided prior to the amendment to the statute here under consideration. In our opinion, it is not in point upon the problem.

CONCLUSION

In the premises, we are of the opinion that Missouri inheritance tax upon contingent remainders should be computed

Mr. M. E. Morris

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upon the status of the beneficiaries as of the date of the decedent's death, thereby giving due regard to the presumption that such status will continue at least for a reasonable period of time.

Respectfully submitted,

WILL F. BERRY, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

WFB:HR

Q.H. 10/28/48
TAXATION : Construction of House Bill No. 888 of the 63rd General
Assembly found Laws of Missouri, 1945, page 1921,
REVENUE : as applied to banks located within the City of St.
Joseph, Missouri.

FILED

64

July 28, 1948

7-29

Honorable M. E. Morris
Director of Revenue
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"It is requested that you furnish this department with a written opinion stating whether or not banks, either national or state, located in Buchanan County are to file a return under House Bill 888 as passed by the 63rd General Assembly and show thereon the entire income for the calendar year 1946 or only for the period after July 1, 1946."

House Bill No. 888 referred to in your letter of inquiry, is an enactment of the 63rd General Assembly known as the "Bank Tax Bill", and now appears Laws of Missouri, 1945, page 1921, et seq.

Section 3 of the Act, in so far as applicable to your precise question, reads as follows:

"Section 3. National banking associations subject to tax for exercising its corporate franchises--how measured in 1946--how measured in 1947--rate of tax.--Every national banking association shall be subject to an annual tax according to and measured by its net income in accordance with method numbered (4) authorized by the Act of Congress of March 25, 1926, amending

Section 5219 of the Revised Statutes of the United States, and every other banking institution as herein defined shall be subject to an annual tax for the privilege of exercising its corporate franchises within the State of Missouri according to and measured by its net income pursuant to the provisions of this Act.

"C. For the taxable year 1947 and each taxable year thereafter the tax shall be measured by the taxpayer's net income as hereinafter defined for the preceding calendar year."

This particular statute and its applicability to banks located within the City of St. Joseph, has been the subject of judicial construction by the Supreme Court of Missouri. The case is found reported as First National Bank of St. Joseph et al. vs. Buchanan County et al., 205 S.W. (2d) 726. Both types of banking institutions, viz. national banks and state banks, were involved in the case.

We shall first consider the status of national banks located within the City of St. Joseph, with respect to the tax due for the year 1947. We think this to be controlled by the decision in the Buchanan County case, supra, wherein the Court said, l.c. 731:

"* * * The Bank Tax Act is certainly retrospective and inoperative as to all the parties in the City of St. Joseph prior to July 1, 1946. The various constitutional and legislative enactments having authorized cities of the first class to levy an ad valorem tax on national bank shares for the tax year 1946 the Bank Tax Act on net income could not be operative as to national banks in the City of St. Joseph after July 1, 1946 because 'The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, * * * .' 12 U.S.C.A. Sec. 548;

Buder v. First National Bank, 8 Cir.,
16 F.2d 990; State ex rel. Orr v.
Buder, 308 Mo. 237, 271 S.W. 508, 39
A.L.R. 1199; Board of Commissioners
of Oklahoma County v. State Board of
Equalization, 155 Okl. 183, 8 P.2d
732. * * * ". (Underscoring ours.)

We next consider the status of state banks
located within the City of St. Joseph, with respect to
the 1947 tax. We quote further from the same opinion,
l.c. 731:

"* * * The only reason offered for the
Bank Tax Act not being applicable to
the state banks after July 1, 1946, is
the state's policy of maintaining them
on a parity with competing national
banks. But no legal reason for their
being exempted after July 1, 1946 is
suggested and we know of none, conse-
quently from and after that date the
appellant state banks in St. Joseph
are subject to the act and are entitled
to the corresponding credits provided
'during the relevant income period.'
Laws Mo. 1945, p. 1921, Sec. 3, Mo.
R.S.A. Sec. 11456.103."

CONCLUSION

In the premises, we are of the opinion that
national banks located within the City of St. Joseph,
Missouri, are not required to pay the tax levied under
Laws of Missouri, 1945, page 1921, for the year 1947.

We are further of the opinion that state banks
located within the City of St. Joseph, Missouri, are re-
quired to include in their return of the tax imposed under
the provisions of Laws of Missouri, 1945, page 1921, all
income received subsequent to July 1, 1946.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR *JTB*
Attorney General

WFB:lr

ROADS AND BRIDGES:

SPECIAL ROAD DISTRICTS:

Special road district in county under township organization is entitled to have returned to such special road district all revenue raised by taxation of property within the special road district under levy authorized by Section 8820, Laws 29, 1947, page 483.

FILED

64

Honorable Roscoe E. Moulthrop
Prosecuting Attorney
Harrison County
Bethany, Missouri

12-2

Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"In a county having township organization, should county return to special road district all revenue raised by taxation of property within such road district, or is the county entitled to retain up to five cents on the hundred dollars valuation pursuant to Sec. 8820, R. S. A. If such sum is retained what use is to be made thereof in view of the fact that a county has no authority to aid a special road district in maintaining its bridges?"

Section 8820, Laws of Missouri, 1947, Vol. I, page 483, provides as follows:

"In addition to other levies authorized by law, the township board of directors of any township in their discretion may levy an additional tax not exceeding thirty-five cents on each one hundred dollars assessed valuation in their township for road and bridge purposes. Such tax shall be levied by the township board, to be collected by the township collector and turned into the county treasury, where it shall be known and designated as a special road and bridge fund. The county court of any such county may in its discretion order the county treasurer to retain an amount not to exceed five cents on the one hundred dollars

assessed valuation out of such special road and bridge fund and to transfer the same to the county special road and bridge fund; and all of said taxes over the amount so ordered to be retained by the county shall be paid to the treasurers of the respective townships from which it came as soon as practicable after receipt of such funds, and shall be designated as a special road and bridge fund of such township and used by said townships only for road and bridge purposes, except that amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18, Chapter 46, Revised Statutes of Missouri, 1939, shall be paid to the treasurers of such road districts; provided, that the amount retained, if any, by the county shall be uniform as to all such townships levying and paying such tax into the county treasury; Provided further, that the proceeds of such fund may be used in the discretion of the township board of directors in the construction and maintenance of roads and in improving and repairing any street in any incorporated city, town or village in the township, if said street shall form a part of a continuous highway of the township running through said city, town or village."

It is our opinion that the provision in such section that the county court of any such county may retain an amount not to exceed five cents on the one hundred dollars out of such special road and bridge fund applies only to that part of the tax raised in that part of the townships which are outside the limits of such special road districts. It is to be noted that the provision "except that amounts collected within the boundaries of road districts formed in accordance with the provisions of Article 18, Chapter 46, Revised Statutes of Missouri, 1939, shall be paid to the treasurers of such road districts" was added to Section 8820, Laws of Missouri, 1945, page 1497, when the section was repealed and reenacted in 1947, Laws of Missouri, 1947, Vol. I, page 483. We believe that the addition of such clause shows that the intention of the Legislature was to provide that all moneys raised in a special road district in a county under township organization should be returned to such special road district in view of the fact that the section

provides that all of said taxes over the amount retained by the county should be paid to the treasurers of the respective townships and that such limitation is not found in the quoted provision with regard to special road districts.

We believe an additional fact which is persuasive in ascertaining the intention of the Legislature in enacting such section to be the fact that the county court is not authorized to expend county funds in special road districts in counties under township organization but that Section 8825 provides for the expenditure of county funds in that part of townships which are not in the special road district when bridges to be built will cost more than one hundred dollars.

CONCLUSION

It is the opinion of this department that all moneys raised in a special road district in a county under township organization under a tax authorized by Section 8820, Laws of Missouri, 1947, Vol. I, page 483, are to be returned to such special road districts.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:VLM

DRAINAGE DISTRICTS: Drainage Districts organized by Circuit Court may issue bonds without vote of two-thirds of voters.

February 16, 1948

FILED

65

2/16

Honorable Walter L. Mulvania
Prosecuting Attorney
Rockport, Missouri

Dear Sir:

This will acknowledge receipt of your letter of recent date in which you request an opinion of this department. Your letter, omitting caption and signatures presents the following problems:

"A rather serious question has been submitted to me bearing upon the extent of the application of Section 26 (a) to 26 (g) of Article VI of the Constitution of Missouri, 1945. In providing a method of incurring an indebtedness in a county, city, incorporated town or village, school district or other political corporation or subdivision by calling an election for that purpose the question arises as to whether or not this impliedly repeals Section 12534 of the Revised Statutes of Missouri, 1939, which provides:

"The Board of Supervisors may, if in their judgment it seems best, issue bonds not to exceed ninety-one per cent of the total amount of the taxes levied under the provisions of section 12511 of this article, in denomination of not less than one hundred dollars, bearing interest from date at a rate not to exceed six per cent per annum * * *."

"Under the foregoing section pertaining to levee districts by circuit courts no election is necessary while the above provision of the Constitution does provide for the calling of an election in order to incur the indebtedness provided therein.

"Under Section 15 of Article X of the Constitution the term 'other political subdivision', as used in that article, does include drainage, sewer and levee districts having the power to tax. I have been unable to find any precedent or decision upon which to base an opinion. I have been asked, as county attorney to pass upon the validity of certain bonds to be issued pursuant to Section 12534 in view of the foregoing Constitutional provision.

"If you can give me any assistance on this question, I would appreciate it."

Section 26 (b) of Article VI of the 1945 Constitution of Missouri provides as follows:

"Any county, city, incorporated town or village, school district or other political corporation or subdivision of the State, by vote of two thirds of the qualified voters thereof voting thereon, may become indebted in an amount not to exceed five per centum of the value of taxable tangible property therein as shown by the last completed assessment for state and county purposes."

Your opinion request is undoubtedly prompted by an effort on the part of some levee district located in your County to issue bonds. The question first to be considered is whether a levee district is included in the classification set up in the above constitutional provision of "other political corporation or subdivision of the State."

There can be no doubt that drainage districts are public corporations, and as such are political subdivisions of the State of Missouri. See *Kinder vs. Little River Drainage District*, 236 S.W. 848, 292 Mo. 267. This being true, such districts are subject to the restrictions set out in Section 26 (b) of Article VI of the Constitution of Missouri providing that in order for the drainage district to become indebted there must be an approval by two thirds of the qualified voters of such district. The only further consideration is, whether bonds issued in benefit districts against special assessments are an indebtedness.

Honorable Walter L. Mulvania -3-

In the case of State ex rel Drainage District vs. Thomson, 41 S.W. (2d) 941, 328 Mo. 728, the Supreme Court of this State held as follows:

"We have repeatedly held that bonds issued in benefit districts against special assessments are not indebtedness within the meaning of Section 12 of Article 10 of the Constitution of Missouri. State ex rel Inf Gentry vs Curtis et al, 319 Mo. 333, 334, 4 SW (2) 467, 473; Birmingham Drainage District vs R.R. Co. 266 Mo. 60, 68, 178 SW 893; Embree vs Road District 257 Mo. 593, 610, 166 SW 282; Houck vs Drainage District, 248 Mo. 373, 383, 154 SW 739."

It will be noted that reference is made in the above quotation to Section 12, Article 10 of the former Constitution which is an obsolete constitutional provision and which has been repealed. However, a like restriction is embodied in Section 26 (b) of the Constitution of Missouri for 1945.

Since the bonds issued by this type of political subdivision would not be an indebtedness under the ruling of the Supreme Court of Missouri, the action of the supervisors of a drainage district in issuing such types of bonds as they are empowered to do it under Section 12534, R.S. Mo. 1939, is not violative of Section 26 (b) of Article VI of the Constitution of Missouri.

CONCLUSION

It is, therefore, the opinion of this department that the Board of Supervisors of the drainage district may, in their judgment issue bonds without the necessity of first obtaining the approval of two thirds of qualified voters of their drainage district.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

3-16
Copy to
J. Smith

TAXATION: Taxes levied under Sec. 11(c), Art. X, Consti. '45, and
COUNTY: Sec. 8606, page 1478, Laws '45, to retire bonds voted
BONDS: must be levied against all taxable property
SPECIAL ROAD DISTRICTS: in the county. It is the duty of collector
to collect all taxes levied on property except
as otherwise provided in Sec. 11084, R.S. Mo. '39.
Special road districts not entitled to receive
foregoing taxes on property located in said
districts
March 12, 1948

FILED

65

3/16

Mr. J. B. Murphy
Collector of Maries County
Vienna, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion which reads:

"Last Spring the voters of Maries County
authorized a bond of \$50,000.00 for road
purposes.

"I have two questions on which I would like
to have your opinion at once. (1) Are
people who live in Special Road Districts
compelled to pay this tax? (some have
refused to do so)

"(2) Am I justified in receiving the rest
of the taxes and issuing a receipt for
same when the taxpayer refuses to pay the
tax levied for paying off the bonded in-
debtedness? (Would I be compelled to do
so?)

"P.S.--Are Special Roads Districts entitled
to any of the money voted for road building
from the \$50,000.00?"

The bond issue approved by the voters of Maries County
referred to in your request was apparently authorized under
and by virtue of Section 11(c) of Article X, Constitution of
Missouri, 1945, and Section 8606, page 1478, Laws of Missouri,
1945, which read:

"Sec. 11(c). In all municipalities,
counties and school districts the rates
of taxation as herein limited may be
increased for their respective purposes
for not to exceed four years, when the

rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor; provided that the rates herein fixed, and the amounts by which they may be increased, may be further limited by law; and provided further, that any county or other political subdivision, when authorized by law and within the limits fixed by law, may levy a rate of taxation on all property subject to its taxing powers in excess of the rates herein limited, for library, hospital, public health, recreation grounds and museum purposes."

"Section 8606. The county courts of the counties of this state are hereby authorized to issue bonds for and on behalf of their respective counties for the construction, reconstruction, improvement, maintenance and repair of any and all public roads, highways, bridges and culverts within such county, including the payment of any cost, judgment and expense for property, or rights in property, acquired by purchase or eminent domain, as may be provided by law, in such amount and such manner as may be provided by the general law authorizing the issuance of bonds by counties. The proceeds of all bonds issued under the provisions of this section shall be paid into the county treasury where they shall be kept as a separate fund to be known as the 'Road Bond Construction Fund' and such proceeds shall be used only for the purpose mentioned herein. Such funds may be used in the construction, reconstruction, improvement, maintenance and repair of any street, avenue, road or alley in any incorporated city, town or village if such street, avenue, road or alley or any part thereof shall form a part of a continuous road, highway, bridge or culvert of said county leading into or through such city, town or village."

You first inquire if the people, who live in the special road districts located in your county, are compelled to pay

the additional tax required to pay off this bonded indebtedness. Section 8606, supra, when enacted by the 63rd General Assembly, specifically repealed Sections 8606, 8607 and 8608, R. S. Mo. 1939. Section 8608, R. S. Mo. 1939, prior to its repeal, did specifically require such taxes to be assessed and levied against all of the property in the county. In repealing Section 8608, supra, the Legislature only enacted Section 8606, Laws of Missouri, 1945, supra, in lieu thereof, and that provision does not designate the particular property to be taxed for the retirement of this bonded indebtedness.

However, we do not consider this important for the reason that the bonded indebtedness was authorized by the vote of all of the people in the county, and furthermore, it was requested for the purpose of maintenance, constructing, reconstructing, improvement and repair of any and all public roads, highways, bridges and culverts in the county, which clearly indicates that all persons are benefitted by said bond issue and that no property otherwise taxable should be exempted from this taxation.

In support of this conclusion, reference can be made to other statutes authorizing the county courts to tax property wherein said statutes do not specifically include or exclude special road districts and other political subdivisions. However, in some of the acts, it requires a certain percentage of such taxes collected on property lying within any special road district to be placed to the credit of said special road district, which shall ultimately be paid to said special road district. (See Section 8527, page 1479, Laws of Missouri, 1945; Section 8691, page 1495, Laws of Missouri, 1945.)

In view of the foregoing, we are of the opinion that all taxable property in the county is subject to this levy for the retirement of this bonded indebtedness.

You next inquire if you are justified in receiving payment of all taxes due on property in your county, except such taxes levied to pay off this bonded indebtedness, and issue a receipt for the taxes tendered. Section 11084, R. S. Mo. 1939, requires the collector to accept tax payments and give his receipt for same, and reads:

"Whenever any person shall pay taxes charged on the tax book, the collector shall enter such payment in his list, and give the person paying the same a receipt, specifying the name of the person for whom paid, the amount paid, what year paid for, and the property and value thereof on which the same was paid,

according to its description on the collector's list, in whole or in part, as the case may be, and the collector shall enter 'paid' against each tract or lot of land when he collects the tax thereon. The collector shall receive taxes on part of any lot, piece or parcel of land charged with taxes: Provided, the persons paying such tax shall furnish a particular specification of the part, and if the tax on the remainder of such lot and parcel of land shall remain unpaid, the collector shall enter such specification in his return, to the end that the part on which the tax remains unpaid may be clearly known. If payment is made on an undivided share of real estate, the collector shall enter on his record the name of the owner of such share, so as to designate upon whose undivided share the tax has been paid."

The foregoing provision is practically the same as was Section 11459, R. S. Mo. 1909, and the Supreme Court, in *State ex rel. Stone, Internal Revenue Collector, vs. Kansas City, Ft. S. & M. Ry. Co. et al.*, 178 S.W. 444, construed that provision. In that case, the defendants paid all the taxes for 1912, except \$23.56, and also tendered all of the 1913 taxes with the exception of \$28.96, which tender was refused. The defendants contended that the foregoing amount they refused to pay represented that portion of the school taxes which they claimed was illegal. The court held that under the foregoing section that it contemplates payment of all taxes of the whole tract and in so holding, said:

"The defendants in apparent good faith contended at the trial of the cause that such disputed portion of the taxes was void by reason of the provisions of section 11 of article 10 of our state Constitution. That contention was decided in favor of the validity of the taxes in an opinion by Faris, J., in *State ex rel. v. St. Louis & S. F. R. Co.*, 174 S. W. 64, decided since this appeal was taken. Appellants do not now insist on reopening that question, but protest that they should not be adjudged to pay the penalty of 1 per cent. a month. They contend that, if they are to be adjudged to pay such penalty, it

should be estimated only on the amount the legality of which was disputed, and not on the amount which was tendered and not accepted. They say that section 11459, Rev. Stat. 1909, requires the collector to receive and receipt for the taxes which may be tendered on any part of a tract of land. That section does not apply to any taxes, except taxes on land. It contemplates the payment of all taxes on a specified part or on an undivided part of the whole tract; but it does not contemplate the payment of a part of the taxes on the whole property. That section has no application to the facts in this case. We know of no law requiring the collector to accept a part of the taxes under the circumstances of this case. The collector's refusal to accept the amount tendered did not result in relieving defendant of the payment of the penalty on the amount tendered."

Also in *Walden vs. Dudley*, 49 Mo. 419, l.c. 420, the court, in holding the collector shall collect all taxes on the assessor's list, the only exception being property expressly exempt by law, said:

"We cannot pass upon the question in this form of action. The collector is an executive officer. In general it is his duty to collect all the taxes contained in the assessor's list. He has no discretion in the matter, and is liable for the non-performance of his duty. The exception is that where property is expressly exempt from taxation by law, then the assessor has no jurisdiction, the assessment is simply void; he has no right to collect it. * * * * *

Therefore, we must conclude that as collector, you should not accept the payment of taxes on any one piece of property without also accepting the payment levied against said property for the retirement of the foregoing bonded indebtedness.

Last you inquire if the special road districts within the county are entitled to any of the money received from such levying of taxes on property in said special road districts and sale of bonds. For a long time, it has been the law, and

still is under some statutes, that special road districts are entitled to receive taxes collected upon all property within said special road districts.

Section 8527, page 1479, Laws of Missouri, 1945, provides that the county court, in its discretion, may levy additional taxes not to exceed thirty-five cents on the hundred dollars assessed valuation of property, and when collected shall be turned into the county treasury to be known as "The Special Road and Bridge Fund" and, further, allocates a certain percentage of all such taxes collected on property in the special road districts to said special road districts. However, the foregoing levy is unquestionably authorized under Section 12(a), Article X, Constitution of Missouri, 1945, which reads in part:

"In addition to the rates authorized in section 11 for county purposes, the county court in the several counties not under township organization, the township board of directors in the counties under township organization, and the proper administrative body in counties adopting an alternative form of government, may levy an additional tax, not exceeding thirty-five cents on each hundred dollars assessed valuation, all of such tax to be collected and turned in to the county treasury to be used for road and bridge purposes. * * *"

Furthermore, the Constitution of this state specifically authorizes such legislation under Section 12(b), Article X, Constitution of Missouri, 1945, which reads:

"Nothing in this section shall prevent the refund of taxes collected hereunder to cities and towns for road and bridge purposes."

While the tax in question is assessed and levied by virtue of Section 11(c) of Article X, Constitution of Missouri, 1945, and Section 8606, Laws of Missouri, 1945, supra, and while the Constitution grants the Legislature authority to allocate such taxes levied on property located within the special road districts to them, apparently the Legislature has not seen fit to enact such legislation in the instant case, and in the absence of same, such taxes, when collected, must all go into the county treasury and be kept in the separate fund known as "The Road Bond Construction Fund" as

Mr. J. B. Murphy

-7-

provided in Section 8606, page 1478, Laws of Missouri, 1945.

CONCLUSION

Therefore, it is the opinion of this department that property located within special road districts in your county is subject to taxation under Section 8606, page 1478, Laws of Missouri, 1945; furthermore, that you, as collector, are not entitled to collect all other taxes against property in your county on any particular piece of property and not collect the tax levied to retire this bonded indebtedness, but it is your duty to collect all taxes levied on such property except as otherwise provided in Section 11084, R. S. Mo. 1939; and last, that the special road districts in your county are not entitled to receive any of the taxes in question that have been levied against property located in such special road districts, in the absence of legislation requiring such taxes to be allocated and transferred to the respective special road districts, in your county.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARR:VLM

Hearing in Probate Court : County patient discharged by
before discharged county : State hospital for the insane
patient in State hospital for : cannot be re-committed without
the insane can be re-committed. : a further sanity hearing by
: Probate Court.

March 15, 1948.

FILED

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3/16

Dr. Orr Mullinax, Director,
Division of Mental Diseases,
Department of Public Health and Welfare,
Jefferson City, Missouri.

Dear Dr. Mullinax:

We have your letter of March 5, 1948, in which you request an opinion of this department. Your letter is as follows:

"This department has before it a question which I believe requires a legal opinion from your department in order that we may be properly guided in our course of action. I have discussed this matter with Mr. Samuel M. Watson, your assistant who is assigned to our department, and have decided that it is best to request a formal opinion. The question is whether or not when a person has been adjudicated to be an insane person by a Probate Court in any county of Missouri and has therefore been committed to one of the State hospitals for the insane and has after treatment and care in such hospital been determined by the proper authorities in the hospital to have recovered his or her sanity or to have so improved as to render further institutional care unnecessary and has been discharged from the hospital on the theory that he or she has either recovered or improved as to render further institutional care unnecessary, does the Probate Court have jurisdiction or authority to demand that the person be taken back into such hospital at a later date without first having a further hearing, at which hearing the question as to the sanity or the degree of the sanity of the person involved and the question as to the necessity for institutional care would be the question for determination by the court.

"In this connection, we refer you to an opinion rendered by your office on July 27, 1945, addressed to Honorable W. R. Painter, President of the Board of Managers of the State Eleemosynary In-

stitutions, on a very closely related subject, the question there having involved the commitments to such institutions by County Courts rather than by Probate Courts. We should be pleased to be informed whether or not the holdings of the opinion rendered above referred to would be applicable in cases in which the commitment has been made pursuant to adjudication by the Probate Court rather than by the County Court."

We have reread the opinion rendered by this Department on July 27, 1945, referred to in your above-quoted letter. That opinion covered the question as to whether a county patient, who had been committed to a State hospital for the insane and who had been discharged by the hospital authorities, could be recommitted to the hospital without a further hearing in the county court. The substance of the aforesaid opinion, in answer to the question, was that recommitment of such a patient, without a further hearing before the county court would amount to a deprivation of liberty without due process of law under Section 10, Article 1, at p. 16 of the present Constitution of Missouri, and under the fifth amendment to the Constitution of the United States.

We are of the opinion that our above-mentioned opinion of July 27, 1945, correctly stated the law as it then existed. The question remaining then is whether the enactment of the law, which took the jurisdiction in the matter of the commitment of county patients away from the county court and placed it in the probate court (Laws of Missouri, 1945, pp. 905-913) changes the law to the extent of making it possible to recommit a discharged patient to a state hospital without having a further hearing in court. In this connection we have carefully considered the 1945 law above cited, and it is our opinion that there is nothing in the new law making it legal to recommit such a discharged patient without a sanity hearing. The only change brought about by the new law being that the sanity hearing must be in the probate court rather than in the county court.

CONCLUSION

We are, therefore, of the opinion that when a county patient has been regularly discharged by a state hospital he

Dr. Orr Mullinax,

-3-

cannot be legally recommitted to such an institution without
a formal hearing in the probate court.

Respectfully submitted,

APPROVED:

SAMUEL M. WATSON
Assistant Attorney-General

J. E. TAYLOR *JS*
Attorney-General

SMW/LD

Copy to Mr. Johnson 5/4
SCHOOLS:

: District transporting school children to another
:
: district may not sell school house.
:

FILED

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May 6, 1948.

5-6

Honorable Chas. E. Murrell, Jr.,
Prosecuting Attorney
Edina, Missouri.

Dear Sir:

You have transmitted to this office a request for an opinion from Miss Bessie L. Hudson, County Superintendent of Schools of Knox County, Missouri, which request is as follows:

"A number of inquiries have come to my office concerning the sale of closed rural school buildings, where enrollments are too small to maintain school, but districts still keep their organization and provide for transportation and tuition of children to other schools.

"Please quote the law pertaining to, or, your opinion on the following questions:

"1. Does a school district, with the approval of the voters, have a right to sell a schoolhouse which will no longer be used for school purposes, and let it be removed from the school site?

"2. If so, and the school site has been deeded in such a way that it reverts to the original owner or his heirs, may that district still remain an organized district, if it keeps its board of directors, transacts all necessary school business of the district, and provides satisfactorily for the education of children residing in the district by arranging for them to attend a school in an adjoining district (town or rural), without being consolidated with or annexed to the adjoining or receiving district.

"3. If the school building may be sold, how large a vote is necessary to determine the right to sell-a majority or a two-thirds vote?

"4. Is there any provision by which this sale may be voted upon at a special meeting, or, must the vote upon the sale of school property be confined to the annual meeting only?"

Section 10324, R. S. Mo. 1939, provides that

"* * * in any district enumerating fewer than twenty-five children the board may, from year to year, arrange with the board or boards of other district or districts for the admission of all children of school age in said district containing fewer than twenty-five children enumerated, and, if desired, arrange for transporting children to and from school. And, when ratified by a two-thirds vote of the qualified voters of said school district, voting at a special meeting, such arrangements shall be final, and the board will be authorized to issue warrants upon the teachers' fund for payment of tuition, and upon the incidental fund for the payment of cost of transporting pupils."

Section 10403, R. S. Mo. 1939, reads as follows:

"The title of all schoolhouse sites and other school property shall be vested in the district in which the same may be located; and all property leased or rented for school purposes shall be wholly under the control of the board of directors during such time; but no board shall lease or rent any building for school purposes while the district schoolhouse is unoccupied, and no schoolhouse or school site shall be abandoned or sold until another site and house are provided for such school district."

(Emphasis supplied.)

Section 10419, R. S. Mo. 1939, provides that the qualified voters of a common school district, at the annual meeting, shall have power by majority vote "To direct the sale of any property belonging to the district but no longer required for the use thereof, to determine the disposition of the same and the application of the proceeds."

A school district has the authority to dispose of its property only in the manner provided by statute. In re Farmers and Merchants Bank of Chillicothe, 63 S.W. (2d) 829.

The latter two statutory provisions above quoted are the only ones authorizing the sale of school houses, and are not, we believe, sufficient to authorize the sale of the school building when the school children in the district are being transported to a school in another district, in accordance with with Sec. 10324, R. S. Mo. 1939.

As can be seen, Sec. 10403, R. S. Mo. 1939, authorizes the sale of the school house by a school district only when another building has been provided for such district. The school to which school children are transported under Sec. 10324 is not, we feel, another schoolhouse within the meaning of Sec. 10403. The arrangement for transportation to another district is not a permanent one, being on an annual basis, and might be discontinued. Should the enumeration show an increase in the number of school children to more than 25 in the district which formerly transported its pupils to another district, such practice would no longer be permissible under Sec. 10324.

In view of the foregoing there is no necessity of answering the second question, inasmuch as, in the opinion of this department, the disposal of the school building is not permitted. The same is true of the third and fourth questions. However, Sec. 10419, quoted above, does answer the third inquiry, as it expressly provides that in cases where a sale is permitted, a majority vote is required. When such sale is permissible, it must also be voted upon at the annual meeting, in accordance with Sec. 10419.

Sec. 10361, R. S. Mo. 1939, authorizes special meeting only for purposes "not restricted to the annual meeting." And inasmuch as authorization of sale of property is restricted by Sec. 10419 to the annual meeting, the matter may not be determined at a special meeting.


CONCLUSION.

It is the opinion of this department that in view of the provisions of Sec. 10403, R. S. Mo. 1939, which requires that a schoolhouse may not be sold until another has been provided for the district, a school district which transports its school children to another school district, in accordance with Sec. 10324, R. S. Mo. 1939, may not for that reason alone sell its schoolhouse.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR 
Attorney-General

RRW/LD

APPROPRIATION FOR OFFICE
OF THE DIRECTOR OF DIVI-
SION OF MENTAL DISEASES.

: The Director of the Division of
: Mental Diseases has authority, with
: the ordinary departmental approval,
: to employ firm of consulting engi-
: neers to make survey of water facil-
: ities at state hospital, and pay
: said firm out of funds appropriated
: for payment of necessary employees
: of the office of said director.

5-27
May 25, 1948.

FILED

65

Dr. Orr Mullinax, M.D.,
Director,
Division of Mental Diseases,
State Office Bldg.,
Jefferson City, Missouri.

Dear Dr. Mullinax:

We have your letter of May 11, 1948, in which you
request an opinion of this department. Your letter is as fol-
lows:

"I am requesting an opinion of your de-
partment on questions arising out of the
following state of facts: Section 5.100,
Laws of Missouri, 1947, being the section
appropriating certain funds to my Division,
being the Division of Mental Diseases of
the Department of Public Health and Welfare,
and more particularly that portion of said
section under sub-division A under the class-
ification of 'Personal Service' appropriates
the sum of \$11,000.00 and specifies that this
sum is appropriated for salaries of the as-
sistant, bookkeepers, stenographers, and
other necessary employees.

"We find it highly necessary and important
to make a survey of the water system at State
Hospital No. 3 at Nevada and we find that
this service can be most expeditiously and
efficiently rendered by Black and Veatch,
a firm of Consulting Engineers located in
Kansas City, Missouri.

"The foregoing facts give rise to the following
questions:

"1. Is there any reason why, when there is
sufficient money under the above mentioned
appropriation, to pay for the services of these
engineers above-mentioned, such money should
not be expended for the procuring of this much
needed survey and report?

"2. Are the words 'other necessary employees' as used in the statute broad enough to permit my Division to employ an engineering firm instead of an individual?"

In considering the questions propounded in your above-quoted letter, we shall first refer to and set forth the language of the appropriation act involved, which is found under Section 5.100, Laws of Missouri, 1947, p. 114, and is as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the General Revenue Fund, the sum of Twenty-two Thousand Five Hundred Dollars (\$22,500.00) to pay the salaries, wages and per diem of officers and employees; for the original purchase of property; for the repair and replacement of property, and for other necessary expenses of the office of the Director of the Division of Mental Diseases in the Department of Health and Welfare; for the period beginning July 1, 1947 and ending June 30, 1948, as follows:

"A. PERSONAL SERVICE:

"Salary of Director	\$7,500.00
"Salaries of the assistant, bookkeepers, stenographers, and other necessary employees,	11,000.00

"B. ADDITIONS:

"Furniture, office and building equipment, and operative equipment,	500.00
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"C. REPAIRS AND REPLACEMENTS:

"Operative and miscellaneous equipment, transportation and conveying equipment, office furniture and equipment, repairs, materials and supplies,	500.00
--	--------

"D. OPERATION:

"General expense; including communication, printing and binding, travel within and without the state, bonds, insurance, and other or office expense,	3,000.00
--	----------

"Total out of General Revenue Fund,	\$22,500.00 "
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(Underscoring ours).

Article 4, Section 23 of the present Constitution of Missouri provides as follows:

"Every appropriation law shall distinctly specify the amount and purpose of the appropriation without reference to any other law to fix the amount or purpose." (Underscoring ours).

In view of this explicit constitutional provision above quoted, to the effect that the amount and purpose of any appropriation must be distinctly specified, we believe that it follows that the language and terms used in an appropriation act, descriptive of the purpose of the appropriation, must be given a specific rather than a general construction. In other words, it is to be presumed that the Legislature intended the descriptive words or terms used to amount to a designated specification of the purpose for which the money is appropriated, because the Constitution requires that the purpose be distinctly specified.

Your inquiry involves the question as to whether or not the words or terms, descriptive of the purpose for which the money in the appropriation act under consideration is appropriated, are broad enough in their meaning to warrant the payment therefrom of employees engaged in a survey of the water facilities at State Hospital No. 3, at Nevada, Missouri.

After this statement of the purposes of the appropriation, the act appropriates the sum of \$11,000.00 for salaries of: "the assistant, bookkeepers, stenographers and other necessary employees", and thereby limits the meaning of the term "office" to the Director of the Division and those persons working with him and under his immediate direction. The appropriation covers the salaries of necessary employees of the office. The first question then is, what employees are necessary employees of the office? Whoever is a necessary employee of the office may be paid from this fund. Obviously, any employee whose services are essential to the fulfillment of the duties of the office is a necessary employee of the office.

This brings us to the consideration of the duties of the office of the Director of the Division of Mental Diseases. We find these duties sufficiently set forth for the purposes of this opinion in Sec. 28 of the Act entitled "Department of Public Health and Welfare", Laws Mo. 1945, p. 945, l.c. 953, as follows:

"* * * Said Director of the Division of Mental Diseases shall have supervision and direct care over the business management of the several institutions under control of the Division, over the buildings, farm lands, livestock, equipment, machinery and other facilities of the institutions. * * * It shall be his duty * * * to make investigations of any complaints which may come to his attention, to advise the department as to the needs of the several institutions and activities, and to perform any other duties pertaining to administering the Division of Mental Diseases.* * *". (Underscoring ours).

We are of the opinion that under the foregoing section a necessary survey of the water supply facilities of a state hospital, the adequacy of which has been called into question, is among the duties of the Director's office, and that necessary employees for the making of said survey may be paid from the above-mentioned appropriation.

Since we hold that the making of this survey comes within the purview of the duties of the office of the Director, and that employees engaged in the survey or investigation may be paid out of the above-mentioned appropriation, it is necessary to consider whether the Director has authority to engage the services of a firm of Consulting Engineers to do this work and to compensate said firm out of the aforesaid appropriation. We believe it to be entirely relevant to the matter in issue to point out that we have been reliably informed that the Division of Health has already made a survey of the water supply system at the Nevada State Hospital, and has reported as follows:

"FIELD SURVEY AND DISCUSSION

"WATER SUPPLY - The water supply at State Hospital No. 3 is obtained from two drilled wells, 750 feet deep and 1,150 feet deep, respectively. The water is pumped from the wells into an aerator, and flows from the aerator into a concrete reservoir. A new concrete reservoir is being constructed and will be operated in parallel with the present reservoir. From the reservoir the water is pumped to an elevated steel tank and the hospital distribution system. Soft water is sup-

plied to the boilers from a lime - soda-ash softening plant and soft water is supplied to the laundry through a zeolite softener. The raw water supply is extremely corrosive and the present facilities for treatment are not adequate to stabilize the water or make it satisfactory for domestic purposes. The source of water supply, the water treatment plant, and the water distribution system should be investigated in detail by a competent engineer as a prerequisite to providing adequate potable water for the Nevada Hospital.

"RECOMMENDATIONS -

"2. WATER SUPPLY. That a competent engineer be retained to make a complete survey, with report and recommendations, of the water supply. This survey and report should include the source of supply, the present treatment facilities, the storage facilities, the pumping and distribution system, and the water softening plant."

The above-quoted report corroborates your contention, that the above-mentioned scientific survey of the water system at the Nevada institution is necessary and important.

The Act establishing the Department of Health and Welfare provides for three divisions thereof; the Division of Mental Diseases being one of them. Laws Mo. 1945, p. 945, l.c. 946. Section 6 of said Act, l.c. 947, provides as follows:

"Each Division Director shall appoint, subject to the approval of the Director of the Department, all employees in his division* *".

Section 7 provides as follows:

"* * * Below the rank of Director and Assistant Director, all employees shall be selected on the basis of merit, as provided by law.* * It shall be the meaning of this section that selection on the basis of merit, as provided by law, shall have reference only to laws passed by the General Assembly of the State of Missouri.* *"

A merit system applicable to employees in the Division of Mental Diseases has been established by the "Missouri Merit System Act". Laws Mo. 1945, p. 1157.

The question then occurs as to whether or not a firm employed for the purpose of making the survey in question at the Nevada Hospital would come under the authority of that act and its provision, for examination and discharge. In this connection, we call attention to Paragraph C of Section 2 of said Act, Laws Mo. 1945, p. 1158, which is in part as follows:

"* * * The following offices, positions and appointments in the agencies covered by this act are hereby exempted from the operation of this act and may be filled without regard to those provisions hereof which relate to the selection, appointment, pay, tenure and removal of persons employed in such agencies:

"(4) Physicians, chaplains and attorneys regularly employed or appointed in any department or division subject to this act, persons employed in a professional or scientific capacity to make or conduct a temporary and special inquiry, investigation, or examination, and persons whose employment is such that selection by competitive examination is not practicable under all the circumstances." (Underscoring ours.)

We deduce from the above-quoted provision of the act establishing the Department of Public Welfare, providing for appointment by the Director of the Division of employees, with the approval of the Director of Public Welfare, there being no limitation of that power prescribed, that he may appoint employees for the purpose of performing any of the duties involved in the administration of said Division, and we deduce from the above-quoted exceptions to the Merit System Act, that employees employed in a scientific capacity are not subject to the Merit System Act with its several limitations.

We also suggest the fact that the above-quoted provision of the Merit System Act gives legislative sanction to the employment of persons in a professional or scientific capacity to conduct a temporary and special inquiry, investigation or examination in the departments to which it generally applies, which include the Division of Mental Diseases.

We are of the opinion, therefore, that there is legal authority for the making of this survey, and that the duty to make said survey is a duty of the Director of Mental Diseases, and that the employee appointed to perform such duty is not sub-

ject to the provisions of the Merit System Act.

Relative to the question as to whether the Director can employ a firm of Consulting Engineers to do this work, we comment that we find no limitation, either in the Constitution or in the applicable statutes, prohibiting the employment of a firm. It might be otherwise, if persons employed in a scientific capacity were not exempted from the provisions of the Merit System Act because the competitive examination feature of the act could not be complied with by a firm, but only by an individual; but since those engaged in scientific research of a temporary nature are exempt from the provisions of the Merit System Act, this competitive examination limitation does not exist. We are of the opinion that, in determining this question, we should have in mind the fact that the general purpose of the law is that all necessary work shall be done. If it shall appear that the firm named in your letter is, in your judgment, qualified to do the work, we are of the opinion that you have the right to employ it and pay it as you would an individual. A firm is a legal entity and acts as an individual, and has the advantage of the scientific knowledge of its several individual members, and might be more accurate than an individual in its conclusions. We suggest, however, that if a firm be employed it should be treated as an employee, have its duties specifically assigned to it and its salary specified, and its activities should be under the supervision and direction of the Division Director, and it should not be treated as an independent contractor.

CONCLUSION.

We are, therefore, of the opinion that, with the ordinary departmental approval, you have the authority to employ a firm of Consulting Engineers to make the needed survey for a specified salary or compensation, and to pay said firm out of the salary appropriation above referred to.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

SMW/LD

VITAL STATISTICS:
PUBLIC HEALTH AND WELFARE:

Section 24(2) of Uniform Vital Statistics Act is violated by issuing different types of certificates for legitimate and illegitimate births.

June 18, 1948

Mr. Elwood C. Musselman
Director of Vital Statistics
Division of Health
Jefferson City, Missouri



Dear Mr. Musselman:

This is in reply to your request for an opinion, which reads as follows:

"When a request for a certified copy of a birth certificate is received in the Bureau of Vital Statistics, the procedure is to issue Exhibit A if the birth is registered as legitimate. If the birth is registered as illegitimate, Exhibit B is issued. For governmental agencies requiring information on births, such as the Army, Navy, or Veterans' Administration, it is customary to use Exhibit C.

"Among school teachers, personnel officers, and other individuals to whom a number of birth certificates are presented it has become apparent why one individual has a certain type of certification and the majority has another type.

"Paragraph (2), Section 24, of House Bill Number 65, which was recently enacted by the Legislature and signed by the Governor provides:

'Disclosure of illegitimacy of birth or of information from which it can be ascertained, may be made only upon information is necessary for the determination of personal or property rights and then only for such purposes;

Mr. Elwood C. Musselman

"Does the present procedure of issuing a different type of certification for illegitimate births from that issued for legitimate births comply with the intent of the above paragraph?"

House Bill No. 65 was passed by the 64th General Assembly and will become effective on the 18th day of July, 1948. The act is known as the "Uniform Vital Statistics Act," and is very nearly the same as that adopted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association.

According to your letter of request, you are at the present time issuing two types of birth certificates; one for births registered as legitimate and the other for births registered as illegitimate. The legitimate birth certificate carries the name and certain information concerning the father and mother, while the illegitimate birth certificate is silent on these facts. Subsection (2) of Section 24 of House Bill No. 65 provides as follows:

"Disclosure of illegitimacy of birth or of information from which it can be ascertained, may be made only upon order of a court in a case where such information is necessary for the determination of personal or property rights and then only for such purpose; or upon the request of the individual whose birth registration is involved, when such information is necessary to the establishment of any claim against the Federal Government." (Underscoring ours.)

The problem with which we are confronted resolves itself into a question of whether or not the above-quoted provision will be violated by continuing to issue two separate types of birth certificates. We leave aside the question of a violation of the language above, "Disclosure of illegitimacy of birth," because that is not involved at this time. We are concerned with whether or not a fair construction of this section would make the present procedure violative of the language, supra, "Or of information from which it can be ascertained," In the case of *State ex rel. Kenney, et al., v. Missouri Workmen's Compensation Commission*, 40 S.W. (2d) 503, the court said, 1.c. 504:

"The fundamental rule in the construction of the statutes is to ascertain and give effect to the purposes of the Legislature (*Consolidated School Dists. v. Hackmann*, 302 Mo. 558, 258 S. W. 1011), and a statute must be liberally construed in the light of its underlying

Mr. Elwood C. Musselman

reasons, keeping in mind the furtherance of the purpose sought thereby (St. Louis & S. F. R. Co. v. Public Serv. Comm. of State of Missouri, 254 U. S. 535, 41 S. Ct. 192, 65 L. Ed. 389)."

In the case of Memmel v. Thomas, 181 S.W. (2d) 168, the court stated, l.c. 169:

"To get at the true meaning of language employed in a statute, we must look at the whole purpose of the act, the law as it was before the enactment, and the change in the law intended to be made.' Pembroke v. Houston, 180 Mo. 627, loc. cit. 636, 79 S.W. 470, 471; Young v. Hudson, 99 Mo. 102, 12 S.W. 632. We should also consider the results of the construction suggested, it being presumed that the Legislature intended a reasonable construction which will permit of beneficial results. Darlington Lumber Co. v. Missouri Pacific R. Co., 216 Mo. 658, loc. cit. 672, 116 S.W. 530."

In the past it has been possible for certain persons such as you mentioned in your letter, namely, school teachers, personnel officers, etc., to whom a number of birth certificates are presented, to become aware of the fact that the birth of certain individuals is on file in the Vital Statistics office as legitimate and others are on file as illegitimate. Thus, in a roundabout method, disclosure is made of information from which illegitimacy can be ascertained.

Webster's New International Dictionary (Seventh Edition) defines the term "information" as follows:

"2. That which is received or obtained through information; specif.: a Knowledge communicated by others or obtained by personal study and investigation; intelligence; knowledge derived from reading, observation, or instruction."

Our Supreme Court, in considering a case wherein the question arose as to whether or not certain information acquired by surgeons and physicians was privilege, stated:

" * * * Information acquired by a physician from inspection, examination or observation of the person of the patient, after he has

Mr. Elwood C. Musselman

submitted himself to such examination, may as appropriately be said to be acquired from the patient as if the same information had been orally communicated by the patient." (Gartside v. Connecticut Mutual Life Insurance Company, 76 Mo. 446, 451.)

In the above opinion the court quoted from the case of Briggs v. Briggs, 20 Mich. 34, as follows, l.c. 451:

" * * * We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting with the veil of privilege whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."

Thus, from the above, it can be seen that the disclosure of information may be had in many different ways than by mere actual and direct disclosure.

We believe that the above-quoted section of House Bill No. 65 was designed to prevent the dissemination of information concerning the illegitimacy of birth, except where an individual's personal or property rights are involved, and in these circumstances special provision is made in Section 24 of House Bill No. 65.

CONCLUSION

In the premises, it is the opinion of this department that the present procedure of issuing a different type of certificate for a birth registered as legitimate than for a birth registered as illegitimate will be in violation of Section 24(2) of House Bill No. 65 when it becomes effective.

Respectfully submitted,

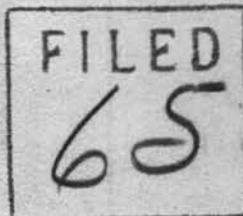
JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

APPROPRIATION TO DIVISION OF	:	Appropriation to Division of
MENTAL DISEASES FOR ADDITIONS,	:	Mental Diseases for * * * *
REPAIRS AND REPLACEMENTS TO	:	replacements to present build-
PRESENT BUILDINGS AND EQUIP-	:	ings available for building new
MENT.	:	dwelling house on farm purchased
	:	by state for State Hospital No. 1
	:	in lieu of inadequate dwelling
	:	house removed by said division.

August 6, 1948.



Dr. Orr Mullinax,
 Director,
 Division of Mental Diseases,
 Department of Public Health and Welfare,
 Jefferson City, Missouri.

8-10

Dear Dr. Mullinax:

We have your letter of July 30, 1948, in which you request an opinion of this department. Your letter is as follows:

"A certain farm located in Callaway County near Fulton, Missouri, was purchased by the State of Missouri in the year of 1947 for use as a part of State Hospital No. 1 at Fulton. After securing the necessary authority from the Director of Public Buildings, we removed the dwelling house located on said farm, which house was not adequate for our purposes, and we now desire to build a house on this property adequate for the purposes of the institution with money appropriated by House Bill No. 484, 64th General Assembly, Section 9.230, page 22.

"We would appreciate advice in the immediate future as to whether or not the section above cited permits us to use money appropriated thereby for the construction of this building."

House Bill No. 484, 64th General Assembly, Section 9.230, page 22, provides as follows:

"There is hereby appropriated out of the State Treasury, chargeable to the Post War Reserve Fund, the sum of Six Hundred Thousand Dollars (\$600,000.00), to the Division of Mental Diseases of the Department of Public Health and Welfare, for State Hospital No. 1, Fulton, for the original purchase of property and for the repair and replacement of property, in the amounts and for the purposes as are specifically designated in this section, for the period beginning July 1, 1948 and ending June 30, 1949, this amount

being in addition to the amount appropriated for these purposes for a like period in Section 5.111 in House Bill 451, an Act of the 64th General Assembly, as follows:

"B. & C. ADDITIONS, REPAIRS AND REPLACEMENTS:

"For constructing and furnishing houses for physicians,	\$42,000.00
"For constructing and equipping employees' dormitory,	450,000.00
"Additions, repairs and replacements (including labor, materials and supplies) to present buildings and equipment,	108,000.00 "

The dwelling house on the farm mentioned in your letter, having been found by you to be inadequate for the purposes of the institution, was wrecked after you obtained the approval of the Director of Public Buildings as required by law. We believe that this dwelling house which you wrecked comes within the meaning of "present buildings" as that term is used in the section above quoted.

In view of the fact that the said section appropriated money for: "Additions, repairs and replacements to present buildings and equipment" and in view of the fact that you propose to replace the old building with the house, the erection of which you now contemplate, we are of the opinion that the money appropriated by the above-mentioned section is available for that purpose.

CONCLUSION.

We are, therefore, of the opinion that you are justified in using a portion of the money appropriated by House Bill No. 484 to the State Hospital at Fulton, for the construction of the proposed dwelling house.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney-General

JB

C O P Y

NEWSPAPERS: The provisions of Section 14968, R.S.Mo. 1939, as amended Laws of Missouri 1943, page 859, relating to duration of consecutive publication of newspapers do not apply to newspapers which became legal publications prior to the effective date of the 1937 act, Laws of 1937, page 432, or the Act of 1943, Laws of 1943, page 859.

March 23, 1948

Filed: #66

Honorable Edgar C. Nelson
Secretary of State
Jefferson City, Missouri



Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department on the question of whether or not the "Sheldon Enterprise" of Sheldon, Missouri, is now a legal publication and authorized to publish legal notices in this state. The facts relative to this publication, which you submitted with your request, are as follows:

"According to information available, the Sheldon Enterprise was established in 1884 by a Mr. Swan. Continuous ownerships are available from that time.

"The failure of publication between the dates March 1, 1947 and June, 1947, was due to the illness of Mrs. J. A. Jones who had kept publication going until that time from the date that her son had entered service. As stated before, that son was publishing when he entered the Marine Corps.

"Mrs. Jones was unable to obtain the help necessary for the continuance of publication for that three months."

Section 14968, R. S. Mo. 1939, as amended in Laws of Missouri, 1943, page 859, which relates to the above inquiry, provides as follows:

"All public advertisements and orders of publication required by law to be made and all legal publications affecting the title to real estate, shall be published in some daily, tri-weekly, semi-weekly or weekly newspaper of general circulation in the county where located and which shall have been admitted to the post office as second class matter in the city of publication;

shall have been published regularly and consecutively for a period of three years; shall have a list of bona fide subscribers voluntarily engaged as such, who have paid or agreed to pay a stated price for a subscription for a definite period of time: Provided, that when a public notice, required by law, to be published once a week for a given number of weeks, shall be published in a daily, tri-weekly, semi-weekly or weekly newspaper, the notice shall appear once a week, on the same day of each week, and further provided, that every affidavit to proof of publication shall state that the newspaper in which such notice was published has complied with the provisions of this section: Provided further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this section. Provided, however, that when any newspaper shall be forced to suspend publication in any time of war, due to the owner or publisher being inducted into the armed forces of the United States, the same may be reinstated within one year after actual hostilities shall have ceased, with all the benefits under the provisions of this section, upon the filing with the Secretary of State of notice of intention of said owner or publisher, his widow or legal heirs, to republish said newspaper, setting forth the name of the publication, its volume and number, its frequency of publication, and its readmission to the post office where it was previously entered as second class mail matter, and when it shall have a list of bona fide subscribers voluntarily engaged as such who have paid or agreed to pay a stated price for subscription for a definite period of time. All laws or parts of laws in conflict with this section except sections 14970, 14971, 14972, Laws of Missouri, 1941, and Section 7771, 7772, and 7773, Revised Statutes of Missouri, 1939, are hereby repealed."

We find no cases which have been before the Missouri courts on the question of the authority of the Legislature to enact legislation regulating newspapers; however, the text writers and out-state courts seem to hold that such legislation may be enacted.

In Volume 46 C. J., page 40, Section 65, it is stated:

"* * * The power to regulate the business of newspaper publishers may be exercised in the interest of the public health, peace, morals, or the general welfare. Newspaper publishers might in this respect be made the subject of legislative classification for appropriate ends."

The reason for legislation requiring regular and continuous publication of a newspaper is well stated by the court in the case of Drabinski vs. Brown, 296 N.W. 538, 540, as follows:

"The main purpose of publication of legal notices is to give notice. The intent of legislature under statute relating to designation of newspapers for publication of notices of tax sales, requiring notice to be published in a regularly established newspaper which is regularly printed and published and has a regular circulation in county was to prevent the publication of legal notices in newspapers of limited circulation established solely for purpose of publishing such notices. **"

The history of Missouri legislation on newspaper regulation as to legal notices reveals that the first law enacted on this subject is found in the Revised Statutes of 1855, page 181. This law was amended in 1873, Laws of Missouri, 1873, page 56, and again amended in 1877, Laws of Missouri, 1877, page 344. None of the laws enacted by the Missouri Legislature up until 1877 contained any provision relating to "continuous publication" of a newspaper as a requirement to make it a legal publication. The next time this act was amended was in 1927, Laws of Missouri, 1927, page 402. In that act, the following, Section 10403, was enacted:

"All public advertisements and orders of publication required by law to be made shall be published in some daily, semi-weekly, tri-weekly or weekly newspaper of

general circulation in the county where located and which shall have been published continuously for a period of at least one year. Provided that when any public notice required by law to be published shall be published in a daily, semi-weekly or tri-weekly newspaper, the notice must appear once a week on the same day of each week, and further provided that every affidavit to a proof of publication shall state that the newspaper in which such notice was published complied with the provisions of this act. All laws or parts of laws in conflict with this section except sections 10405, 10406 and 10407, Revised Statutes of Missouri, 1919, are hereby repealed."

(Underscoring ours.)

This 1927 act remained in force without amendment until 1937, Laws of Missouri, 1937, page 432, when the "continuous publication" clause of the 1927 act was modified by the following proviso clause:

" * * * Provided, further, that the duration of consecutive publication herein provided for shall not affect newspapers which have become legal publications prior to the effective date of this act. * * *"

The language of this proviso clause is clear and unambiguous and does not need any construction. It definitely exempted newspapers, which had become legal publications prior to the effective date of the said 1937 act, from the provisions of the law which required "consecutive publication" in order that such newspapers might qualify as a newspaper to publish legal notices.

In 1943, Laws of Missouri, 1943, page 860, the law was amended as it is now written. The "proviso clause" of the 1937 act, referred to supra, was carried on and reenacted in the 1943 act. Therefore, publications which were legal publications when the 1937 and 1943 acts became effective were and are now exempted from the "consecutive publication" provisions of the acts. The statement of facts which you have submitted reveal that the "Sheldon Enterprise" was established in 1884 and that the only break in the continuous publication of this newspaper that is in question is for the period of March 1, 1947, to June, 1947. It was, therefore, being

published when the 1937 and the 1943 acts became effective. For the purpose of this opinion, we will assume that it was a "legal publication" on the effective date of said acts.

CONCLUSION

From the foregoing, it is the opinion of this department that the "Sheldon Enterprise" is exempted from the provisions of Section 14968, R. S. Mo. 1939, as amended in Laws of Missouri, 1943, page 860, which requires "consecutive publication" of a newspaper in order to be authorized to publish public advertisements and other legal publications and notices.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

STATE BOARD OF TRAINING SCHOOLS:
RESIDENCE:

Employees of Board not required
to be residents; officers appointed
by Board, except those who are
specialists, must have resided
in state for one year.

May 14, 1948

FILED

66

5-17

State Board of Training Schools
Jefferson City, Missouri

Attention: James C. Neagles
Assistant Director

Gentlemen:

This is in reply to a letter from the Assistant Director of Training Schools requesting the opinion of this department for the State Board of Training Schools. The letter reads, in part, as follows:

"In an attempt to improve the quality of the personnel of the three training schools under our jurisdiction, we often find it difficult to recruit the type of employees we need when we confine ourselves to residents of Missouri. At present we have a number of applicants for positions who possess fine qualifications, but they are not residents of this state. There is a doubt in our minds whether we must reject them.

* * * * *

"In view of the above, my board has instructed me to request that you clarify our position in the matter of our relationship to the department of corrections insofar as the employing of personnel who are not residents of Missouri is concerned."

The Department of Corrections, consisting of three divisions, was created and established by an act of the General Assembly, found in the Laws of Missouri, 1945, page 723.

It is provided by Section 38, Article IV of the Constitution, that all state training schools and industrial homes for

boys and girls shall be classified as educational institutions and shall be in charge of a board of trustees. Section 20 of the above act of the General Assembly, implementing Section 38, Article IV of the Constitution, creates a State Board of Training Schools which shall have charge and control of all training schools and industrial homes for boys and girls of this state. Such schools were therein classified as educational institutions.

By Section 21 of said act, and pursuant to Section 12, Article IV of the Constitution, the State Board of Training Schools was assigned to the Division of Educational Institutions in the Department of Corrections. It was provided, however, that said Board was not subject to orders of the director of said Department of Corrections and had only such relationship with said department as is set out in said act.

According to Section 4 of said act, all employees of said department shall be citizens of this state. Section 4 is as follows:

"All employees of the department of corrections shall be persons of good character and integrity, and citizens of this state. Below the rank of director and assistant director, all employees shall be selected on the basis of merit as provided by law."

However, Section 30, found in that part of said act directly pertaining to the State Board of Training Schools and relating to the various training schools, sets out the same qualifications for employees of said Board as are provided in Section 4 for employees of the Department of Corrections, with the one exception that Section 30 does not contain the requirement that the employees shall be citizens of Missouri. Said section provides:

"It shall be the duty of the board of training schools to select and employ all employees on a basis of merit as provided by law, and who shall be persons of recognized good character and integrity."

The question is, therefore, which of these provisions should be applied to employees of the various state training schools. We believe that Section 30 is controlling. Section 4 could

hardly be held applicable because it relates only to the Department of Corrections which is separate from the State Board of Training Schools. The act itself sets out, and the Constitution contemplates, this separation. The only relationship which exists is that which is set out in said act. This statutory relationship is slight and concerns only the release on parole of juveniles committed to said Board. The Board is authorized to call on the Board of Probation and Parole, which constitutes the third division in the Department of Corrections, for pre-parole assistance and for supervision of parolees after release. The relationship certainly does not warrant the application of the provisions of Section 4 to said Board of Training Schools or any of the institutions under its control.

The special provision in the training school law was intended by the General Assembly to be controlling or it would not have been included there. We believe the fact that a residence requirement was not included in Section 30 is highly significant and is conclusive on the question under consideration as far as that section is applicable.

The ascertainment of the intention of the General Assembly is the primary factor in the construction of statutes. *Turner v. Kansas City*, 191 S. W. (2d) 612, 1.c. 617. Our conclusion is reached by putting the plain and rational meaning on the language of the statute in order to promote its object and purpose. *Donnelly Garment Co. v. Keitel*, 193 S. W. (2d) 577, 1.c. 581; *Haynes v. Unemployment Compensation Commission*, 183 S. W. (2d) 77, 1.c. 81. Such a residence requirement cannot be read into Section 30 because it is fundamental that provisions not plainly written or necessarily implied from what is written will not be inserted or interpolated therein when otherwise upon the face of the act it would not appear. *Allen v. St. Louis-San Francisco R. Co.*, 90 S. W. (2d) 1050, 1.c. 1053; *State v. Allen*, 128 S. W. (2d) 1040, 1.c. 1043; *Sayles v. Kansas City Structural Steel Co.*, 128 S. W. (2d) 1046, 1.c. 1051. The language of said section is plain and unambiguous and must be given effect as written. We cannot search for a meaning beyond the statute itself. *St. Louis Amusement Co. v. St. Louis County*, 147 S. W. (2d) 667; *State v. Phillips Pet. Co.*, 160 S. W. (2d) 764, 1.c. 769.

A somewhat analogous situation is presented with regard to the State Board of Education for the reason that the training schools are classified as educational institutions and are

assigned to the Division of Educational Institutions in the Department of Corrections. It is provided in Section 2(b), Article IX of the Constitution, that the State Board of Education shall, upon the recommendation of the Commissioner of Education, appoint the professional staff of the department. An identical provision is found in the Laws of Missouri, 1945, page 1639, Section 8, which implements that section of the Constitution. No provision requiring employees to be citizens of the state is found in the laws relating to that department, nor is such a provision contained in the laws creating and setting up the Merit System, found in Laws of Missouri, 1945, page 1157.

We now direct your attention to Section 8, Article VII of the Constitution, which we believe is applicable to the question under consideration. Said Section 8 provides:

"No person shall be elected or appointed to any civil or military office in this state who is not a citizen of the United States, and who shall not have resided in this state one year next preceding his election or appointment, except that the residence in this state shall not be necessary in cases of appointment to administrative positions requiring technical or specialized skill or knowledge."

It appears that the above provision being a part of the organic law of the state is controlling over said Section 30 with regard to all officers as distinguished from employees, except those officers who are required to have technical or specialized skill or knowledge. Section 30, of course, sets forth the general qualifications that must be possessed by all persons employed by the State Board of Training Schools, and it necessarily follows, in view of Section 8, Article VII of the Constitution, that said Section 30 also applies to all offices which require technical or specialized skill or knowledge.

Conclusion.

In view of the foregoing, it is the opinion of this department that employees of the State Board of Training Schools are not required to be residents of this state.

It is further the opinion of this department that officers appointed by the State Board of Training Schools, except those officers possessing technical or specialized skill or knowledge, must have resided in this state one year next preceding their appointment.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR *J.E.*
Attorney General

DD:ml

Revised
TRAINING BOARD: Construction of Section 8994, Senate Bill No. 289, passed by the 64th General Assembly, relating to commitments to the State Board of Training Schools.

June 24, 1948

FILED

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7-2

Board of Training Schools for Boys
State of Missouri
Jefferson City, Missouri

Attention: Mr. James C. Neagles
Assistant Director

Gentlemen:

This will acknowledge receipt of your recent letter, enclosing a letter from Mr. Bert E. Fenenga, Superintendent of the Training Schools for Boys at Boonville, Missouri, requesting an opinion which reads:

"Will you please get a clarification from the Attorney General's Office regarding the meaning of Section 8994, of Senate Bill No. 289, lines 7, 8, 9 and 10, inclusive, which state, 'Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his 21st birthday, all commitments to the Board shall be made for an indeterminate period of time.'

"The point which I should like to have cleared up is whether this is to be interpreted that Judges may still send offenders for a stated length of time, say up to his 21st birthday, or that sentences for juveniles are strictly indeterminate. If the latter is true, then please tell us what is meant by the phrase relating to his 21st birthday.

Board of Training Schools for Boys
Attn: Mr. James C. Neagles

"Another interpretation which might be placed on this phraseology is that these lines apply only to girls since they may be committed to an institution until the age of 21; and another interpretation might be that this phrase applies to youths who may have been committed before March 4, 1948, the date when this act went into effect.

"I should greatly appreciate an official interpretation of what the law intends."

Section 8994 (1), Senate Bill No. 289, passed by the 64th General Assembly reads:

"Any boy over the age of 12 years and under the age of 17 years and any girl over the age of 12 years and under the age of 21 years who has been convicted of a crime or who is found by the juvenile or circuit court to be in need of training school education and discipline may be committed to the state board of training schools. Except where a child who is convicted of a crime and sentenced for a period of time which will not expire until after his 21st birthday, all commitments to the Board shall be made for an indeterminate period of time."

Such boys or girls as are referred to hereinabove in Section 8994 of said Bill, for boys over 12 years and under 17 years of age, and for girls over 12 and under 21 years of age, when convicted of a crime and when found by a juvenile or circuit court to need training or discipline, may be committed to the State Board of Training Schools. That much of the law seems to be self-explanatory and needs no further construction. Now, we come to the part that is somewhat ambiguous, however, a careful analysis convinces us that only one conclusion can be reached as to the legislative intent in enacting Senate Bill No. 289, supra.

Board of Training Schools for Boys
Attn: Mr. James C. Neagles

The primary rule of construction of statutes is to ascertain the lawmaker's intent from the words used, and to give it that effect. See: *Fischbach Brewing Co. vs. City of St. Louis*, 95 S.W. (2d) 335, 231 Mo. App. 793. Also: *State vs. Ball*, 171 S.W. (2d) 787.

We believe that the legislative intent in enacting Senate Bill No. 289, supra, was that all commitments to said Board shall be made for an indeterminate period of time, except, where said boys or girls are convicted of a crime and sentenced for a period which will not expire until after his or her 21st birthday and in such case the commitment must specify the exact time for which he or she was sentenced.

Section 8996(2) Senate Bill No. 289, supra, further authorizes said Board to transfer any child under its jurisdiction to any other institution for children, public or private, if the Board deems it advisable, and further provides that said Board may, for purpose of discipline, with the Governor's approval, transfer persons committed to its custody, to a state adult correctional institution, provided that no person committed to said Board for an indeterminate period of time shall be confined in such adult correctional institution after reaching the age of 21 years. By reading Section 8996, supra, along with Section 8994, supra, we are of the opinion that the Legislature has prescribed a complete scheme for the proper training and education for such boys and girls committed to said Board.

CONCLUSION

Therefore, it is the opinion of this Department that any boy or girl committed to the State Board of Training Schools, when the boy is over the age of 12 and under 17 years of age, and the girl is over the age of 12 and under the age of 21 years, such commitments shall be for an indeterminate period of time, except in such cases where the child may be convicted of a crime and sentenced for a period which will run after his 21st birthday, and in such cases the commitment must include the specific time that he shall be committed to said Board.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

ARH:ir

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

ELECTIONS: Primary election returns for elective state officers canvassed by board of state canvassers.

FILED

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June 30, 1948

7-2
Honorable Edgar C. Nelson
Secretary of State
Jefferson City, Missouri

Dear Mr. Nelson:

This department is in receipt of your request for an opinion which reads as follows:

"Article IV, Section 18, of the new constitution relates to the duties of the secretary of state in handling the returns of primary elections for the offices of governor, lieutenant governor, secretary of state, state auditor, state treasurer and attorney general.

"This section says, 'The returns of every election for governor, lieutenant governor, secretary of state, state auditor, state treasurer and attorney general shall be sealed and transmitted by the returning officers to the secretary of state, who shall appoint two disinterested judges of a court of record of the state, and the three shall constitute a board of state canvassers.' Then, it goes on to say, 'The board shall meet at the State Capitol on the second Tuesday of December next after the election'

"The writer has been unable to find any mention of the meeting of the board after the primary, although Section 11566 of the Missouri Election Laws states, 'The canvass of votes shall be made in the same manner and by the same officers as the canvass of an election!'"

As stated in your request, Section 18, Article IV of the Constitution of Missouri, 1945, provides in part as follows:

"The returns of every election for governor, lieutenant governor, secretary of state, state auditor, state treasurer and attorney general shall be sealed and transmitted by the returning officers to the secretary of state, who shall appoint two disinterested judges of a

court of record of the state, and the three shall constitute a board of state canvassers. The board shall meet at the State Capitol on the second Tuesday of December next after the election and forthwith open and canvass the returns of the votes cast and from the face thereof ascertain and proclaim the result of the election. * * * *"

It might be well to point out that Section 11461, R. S. Mo. 1939, provides a different method for canvassing the votes for the elective state officials but since this section is in conflict with Section 18, Article IV, quoted above, it has been repealed and superseded. State ex rel. Elsas v. Missouri Workmen's Compensation Commission, 318 Mo. 1004, 2 S.W.(2d) 796.

Section 11566, R. S. Mo. 1939, is found in the article which relates to primary elections and provides in part as follows:

"The canvass of votes shall be made in the same manner and by the same officers as the canvass of an election * * * *"

It will be noted that Section 11566, supra, relating to the canvassing of the votes of a primary election incorporates by reference the laws relating to the canvassing of the votes of the general election and such laws are included and must be read into the section as if they were actually set forth therein. State ex rel. School District vs. Lee, 334 Mo. 513, 66 S. W.(2d) 521.

The rule as to how much of a statute or a part of a Constitution is incorporated in another statute by reference is given in State v. Lloyd, 7 S.W.(2d) 344, as follows: (l.c. 346)

"So a statute may adopt a part or all of another statute by a specific and descriptive reference thereto, and the effect is the same as if the statute or part thereof adopted had been written into the adopting statute. Where, however, the adopted statute is referred to merely by words describing its general character, only those parts of it which are of a general nature, or particularly relate to the subject of the adopting statute, will be construed as incorporated into the latter in the absence of a clear intention to adopt the whole act." (underscoring ours.)

Therefore, when Section 11566, supra, incorporates the procedure for canvassing the votes set forth in Section 18, Article IV, of the Constitution it adopts only that part of the provision which

is of a general nature and the clause that provides that the canvassing board shall meet at the State Capitol "on the second Tuesday of December next after the election" does not apply and is not included therein.

In view of the fact that no time is prescribed within which the board of state canvassers must canvass the results of the primary election the general rule will apply, that is, that where no time is designated within which an officer must perform a duty it is presumed that such act must be performed within a reasonable time.

CONCLUSION

It is, therefore, the opinion of this department that the returns of the votes of the primary election for the nomination for the offices of Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor and Attorney General shall be canvassed by the board of state canvassers consisting of the Secretary of State and two disinterested judges of a court of record of this state appointed by the Secretary of State and such canvass shall be made within a reasonable time after the primary election.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

AMO'K:mw

APPROVED:

J. E. TAYLOR *JET*
Attorney General

cc
B7 10/28

MOTOR VEHICLES: Association of farmers organized for the sole purpose of transporting milk from their farms to market in St. Louis required to take out a local commercial motor vehicle license.

June 30, 1948

FILED

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7-7

Honorable Onie D. Newlon
Prosecuting Attorney
Ralls County
New London, Missouri

Dear Sir:

Restating your request for sake of brevity, you inquire if an organization such as the Transport Service Sanitary Milk Producers, organized under the laws of Illinois for the sole purpose of transporting milk from farms belonging to members of said organization and located between the Iowa line and St. Louis, Missouri, to companies located in St. Louis offering the best available price for such milk products, is required under the laws of this state to pay the full amount of license fee charged commercial motor vehicles to operate their motor vehicles in this state, or merely pay one-third of that amount required of commercial motor vehicles. The individual farmers belonging to the foregoing association deliver the milk to the highway from their farms, where it is picked up for delivery to St. Louis. Said company is a nonprofit corporation, or more in the nature of a co-operative organization. After all expenses are paid, any profit remaining is distributed between the members of said organization.

This department, under date of January 14, 1948, rendered an opinion to Colonel Hugh H. Waggoner, Superintendent of the Missouri State Highway Patrol, on this identical question, wherein it was held that such motor vehicles do not come within the classification of a "local commercial motor vehicle," but are operating as a "commercial motor vehicle," and must pay the license fee required for commercial motor vehicles. However, the facts submitted in the request for that opinion are not the same as those submitted in your present request, and this accounts for the conclusion in this opinion being contrary to the one reached in the previous opinion rendered by this department.

Assuming that the foregoing facts related represent a true picture of the organization in question, then we are inclined

to believe that such organization is only required to pay one-third of the amount required of a commercial motor vehicle.

Section 5721, Laws of Missouri 1947, exempts motor vehicles used exclusively in transporting farm and dairy products from the farm or dairy to the creamery, warehouse or other original storage or market, from the provisions of Article 8, Chapter 35, R.S. Mo. 1939, which deals with regulation of motor vehicles and carriers by the Public Service Commission of the State of Missouri. However, such article has nothing whatsoever to do with the requirement of license fee for operating any motor vehicle over the highways of this state as provided in Article 1, Chapter 45, R.S. Mo. 1939.

The specific provision which requires construction in the instant case is Section 8369, page 1197, Laws of Missouri 1945, which reads in part:

"For commercial motor vehicles having
a gross weight of:

(Here will be found the various charges
in accordance with various gross weights)

* * * * *

"For each local commercial motor vehicle
there shall be paid a fee equal to one-
third of the fee specified above for other
commercial motor vehicles, provided, how-
ever, no commercial motor vehicle fee shall
be less than \$10.00.

"The term 'local commercial motor vehicle'
includes every 'commercial motor vehicle'
as defined in Section 8367, of this act,
while operating within this state and used
for the transportation of persons or property:

"1. Wholly within any municipality or urban
community, or

"2. Wholly within any municipality or urban
community and a zone extending 25 air miles
from the boundaries of any municipality or
urban community, or contiguous municipality
or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or livestock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms."

Section 8367 of the same act, page 1195, Laws of Missouri 1945, defines "commercial motor vehicle" as follows:

"* * * 'Commercial motor vehicle.' A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers.* * *"

There can be no question but that the motor vehicle in question is considered a "commercial motor vehicle" under the foregoing definition. The only remaining matter for determination is whether such motor vehicle should be classified as a "local commercial motor vehicle." If so, then only one-third of the amount of license fee charged for a commercial motor vehicle may be charged in this instance. It is our understanding, under the facts stated in your request, that all such motor vehicles are operated strictly intrastate. In such case, if said motor vehicles are used in the transportation of property, as provided under any one of the four conditions hereinabove enumerated under Section 8369, supra, then said motor vehicle should be classified as a "local commercial motor vehicle." Under the foregoing facts, we think said motor vehicle should be classified as a "local commercial motor vehicle." Under subsection 4 of Section 8369, supra, there can be no question about the persons comprising said organization being principally engaged in farming. While "agricultural products" have not been defined under this act, we do find many appellate court decisions in many states which hold that "agricultural products" include dairy products. In the case of *In re Rodgers*, 279 N.W. 800, 1.c. 802-803, the court, in holding that dairy products come within the term "agricultural products," said:

"The first question for our consideration is: What is meant by agricultural commodities?"

"In the case of District of Columbia v. Oyster, 4 Mackey 285, 15 D.C. 285, 54 Am. Rep. 275, in the body of the opinion the court said (page 286):

"'But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits.

"'The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and with those who are engaged in the culture of the soil. It is, in every sense of the word, a part of the farm product. It is depended upon and looked upon as one of the results and one of the means of income of the farm, and in a just sense, therefore, it may be considered produce.'

"In 2 Am. Jur. 395, Sec. 2, speaking of agriculture, it is said: 'The term is broader in meaning than "farming;" and while it includes the preparation of soil, the planting of seeds, the raising and harvesting of crops, and all their incidents, it also includes * * * dairying.' To like effect are Gregg v. Mitchell, 6 Cir., 166 F. 725, 20 L.R.A., N.S., 148, 16 Ann. Cas. 510; Dillard v. Webb, 55 Ala. 468.

"In the Non-Stock Cooperative Marketing Act (Comp. St. 1929, sec. 24-1401), the Nebraska legislature of 1925 defined the term 'agricultural products' as 'field crops, horticultural, viticultural, forestry, nut, dairy,

livestock, poultry, bee and farm products.' Decisions of the courts have adopted the foregoing definition of agricultural commodities or products. We believe that the applicant in this case was engaged in hauling agricultural commodities. This brings us to the question of whether or not the applicant is a common carrier or a contract carrier."

In *Kimball v. Blanchard*, 7 Atl. (2d) 349, 1.c. 396, the court said:

"The noun 'produce' has 'no definite, exact and technical meaning. It may be used in a larger or more restricted sense.' *District of Columbia v. Oyster*, 4 Mackey 285, 15 D.C., 285, 286, 54 Am. Rep. 275. 'Agricultural product or products' is one of its definitions, and 'agriculture' in its broad use includes dairying. Webster's New International Dictionary, 2d Ed. In construing the phrase 'sale of farm produce on the premises' attention should be paid to the comprehensiveness of its terms and to the extent of its application."

See also *District of Columbia v. Oyster*, 15 D.C. 285, 1.c. 286:

"But the common parlance of the country, and the common practice of the country, have been to consider all those things as farming products or agricultural products which had the situs of their production upon the farm, and which were brought into condition for the uses of society by the labor of those engaged in agricultural pursuits, as contradistinguished from manufacturing or other industrial pursuits.

"The product of the dairy or the product of the poultry yard, while it does not come directly out of the soil, is necessarily connected with the soil and with

those who are engaged in the culture of the soil. It is, in every sense of the word, a part of the farm product. It is depended upon and looked upon as one of the results and one of the means of income of the farm, and in a just sense, therefore, it may be considered produce."

Furthermore, the laws of this state define "agricultural products" so as to include dairy products. However, such definitions are for the purpose of other specified articles and not the article dealing specifically with the licensing of motor vehicles. However, such definitions do support the foregoing decisions in defining agricultural products. Under Section 14290, R.S. Mo. 1939, which deals with the article on standardization and inspection of agricultural products, "agricultural products" is defined: "'Agricultural products' shall include horticultural, viticultural, dairy, bee, and any farm product." Also, under the article on nonprofit cooperative associations, Section 14334, R.S. Mo. 1939, provides in part, under subsection (a), that whenever the term "agricultural products" occurs in said article it shall include horticultural, viticultural, forestry, dairy, livestock, poultry, bee or any farm products.

CONCLUSION

Therefore, it is the opinion of this department that the Transport Service Sanitary Milk Producers, organized under the laws of Illinois and authorized to do business in this state, under the foregoing facts submitted in your request, in transporting dairy products of its members from their farms to the market, all within this state, is required to obtain a "local commercial motor vehicle" license for their motor vehicles used in transporting said products. This amounts to only one-third of the cost of a "commercial motor vehicle" license.

Respectfully submitted,

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JET

ARH:LR

CORPORATIONS - Dissolution: A banking corporation is not dissolved by reason of the sale of its assets or property to another banking corporation.

November 29, 1948



Honorable Edgar C. Nelson
Secretary of State
Jefferson City, Missouri

Attention: Honorable W. Randall Smart
Supervisor of Corporations

Dear Secretary Nelson:

This will acknowledge your letter of recent date requesting an opinion from this Department on the question of the acceptance by your Department of an anti-trust affidavit and an annual registration report for the year 1948, of the Bank of Tina, Carroll County, Missouri, and in which there is involved the further question of whether the Bank of Tina now exists as a corporation. Your letter is as follows:

"For many years, this department has maintained a record of all banks, excepting national banks of this state. Any instruments in connection with the articles of incorporation are first filed and approved by the Finance Department, with the exception of the anti-trust affidavit and annual registration report, which are filed with this department annually.

"The Bank of Tina was incorporated the 25th day of April, 1924 and we are advised that under date of February 22, 1943 that the assets and obligations were taken over by the Farmers and Merchants Bank of Hale, Mo., and, we are advised by the State Finance Department that the bank has had no legal corporate existence since that date and with that information, this department refused to accept the anti-trust affidavit and annual registration report for the year 1948. The State

Honorable Edgar C. Nelson

Finance Department does not recognize this company as a corporate entity. This company insists that this department accept the filing of these reports and continue this company in good corporate standing.

"We would appreciate if you would kindly advise this department if we may properly accept the filing of these reports under the facts and law."

It appears from your letter that the Bank of Tina was incorporated on April 25, 1924, and that on February 22, 1943, the bank sold and disposed of its assets and the same were purchased by the Farmers and Merchants Bank of Hale, also of Carroll County, Missouri. Your question here is whether, by reason of the circumstances of the said respective sale by the Bank of Tina of its assets and their purchase by the Farmers and Merchants Bank of Hale, Missouri, there was accomplished a disincorporation or dissolution of the said Bank of Tina so that it would not be empowered to make the anti-trust affidavit and pay the annual franchise tax to your Department.

You state in your letter that: "The State Finance Department does not recognize this company as a corporate entity."

It may be, in taking that position, and upon such information your Department appears to have refused to accept the anti-trust affidavit and the annual franchise tax from the Bank of Tina, that the Finance Department is influenced by the terms and provisions of Section 7974, R.S. Mo. 1939. We will discuss that Section and its effect upon the sale of the assets of one bank to another as bearing upon consolidation or merger, or the possibility of the sale of such assets constituting in law a dissolution of a bank which sells its assets--in this case, the Bank of Tina,--later in this opinion.

There are numerous methods which may be employed to institute and carry out proceedings for the dissolution of a corporation under the statutes and decisions of Missouri. The dissolution of a corporation may be undertaken and accomplished, according to the facts existing in each case, upon one of the following grounds, to-wit:

- 1) When the time for which a corporation is organized to exist has expired, unless organized to exist perpetually, without a renewal of the period of its existence.

Honorable Edgar C. Nelson

2) By electing to dissolve voluntarily without invoking legal procedure as provided in Section 79 of the new Corporation Code of this State, Laws of Missouri, 1943, page 454.

3) By electing to dissolve voluntarily with the approval of the Secretary of State, or by a decree dissolving the corporation entered of record by a court of equity, as provided in Sections 80, 81 and 83 of the new Corporation Code of this State, Laws of Missouri, 1943, pages 454, 455 and 456.

4) By involuntary dissolution upon information filed by the Attorney General for any of the causes mentioned in Section 84, new Corporation Code, Laws of Missouri, 1943, page 457, and following the provisions of Sections 84, 85, 86, 88 and 94 of the new Corporation Code of this State, Laws of Missouri, 1943, pages 457, 458, 459 and 461.

5) By being proceeded against in quo warranto by the State at the relation of the Attorney General for violation of its charter and corporate franchise or for violation of the criminal laws of the State, or for the violation of the Anti-Trust Laws of the State.

6) By being proceeded against in quo warranto by the State at the relation of the Attorney General for failure and refusal to pay its annual franchise tax, or to file the anti-trust affidavit required of any such corporation by law.

The above are the usual, and, so far as we are advised, customary, though not exclusive, methods which may be employed, according to the grounds and facts existing for procedure, in the dissolution of a corporation in this State. There are perhaps other methods, such as the sale of the property of a corporation by the State under a State lien thereby destroying the objects for which the corporation was instituted, (see: 48 Mo. 548), and, no doubt, the sale of the assets of a corporation under a decree of a federal court in re-organization or in bankruptcy

Honorable Edgar C. Nelson

would accomplish the same result. There may be methods to dissolve a corporation other than those we have mentioned, but we are not concerned with them here.

The corporation here under question--the Bank of Tina--has not itself, according to the facts before us, voluntarily undertaken to dissolve, nor have involuntary proceedings been instituted against it by any authority to accomplish its dissolution upon any of the grounds above enumerated.

There is no statute, decision or rule of text law of which we are advised, which approves or advocates the sale of the assets of a corporation, in and of itself, or the cessation of its business as resulting in the dissolution of such corporation. There is an abundance of sound authority to the contrary. Our Supreme Court has so held in numerous cases, from two of which we herein quote, and so does Corpus Juris as a text authority so hold, citing Missouri Supreme Court cases and cases from many other States. 14A C.J., 1116, on this principle states the following text:

"Since the possession of property is not essential to corporate existence, it follows that the transfer or loss by a corporation of all its property cannot work a dissolution.
* * * ."

Our Supreme Court in the case of Kansas City Hotel Co. vs. Sauer, 65 Mo. 279, on this point, in its decision, 1.c. 288, held:

"The sale, however, of the hotel property by plaintiff would not per se accomplish its dissolution (Hill v. Fogg, 41 Mo. 563), nor would a dissolution of corporate existence be implied by mere cessation of active business. * * * ."

The case of State National Bank of St. Joseph vs. Robidoux, et al., was before our Supreme Court, reported in 57 Mo. Rep. 446. One question involved in the case was whether the Bank of Missouri could dispose of its property by sale or assignment to the plaintiff, the State National Bank of St. Joseph, and whether the purchaser, or assignee, of the lien of the Bank of Missouri could sue the defendants on a covenant in regard to the payment of taxes. The Court held that the assignment of its property by the Bank of Missouri to the plaintiff bank was valid and that the plaintiff bank which has succeeded by assignment to the lien sued

Honorable Edgar C. Nelson

on could maintain the suit, although the plaintiff bank had ceased to carry on its business, and that plaintiff bank was not dissolved by reason thereof. The Court, in so holding, 1.c. 451, said:

"* * * It further claimed that the plaintiff has ceased to do business for 18 months before this suit was instituted; and therefore is an extinct corporation and has no right to sue. No evidence was adduced to show that the plaintiff was deprived of the right to sue. Its cessation of active business does not imply a dissolution of the corporation, so as to deprive it of its right of action."

These authorities indicate very clearly that the sale of the assets of one bank to another, such as was had in the transaction between the Bank of Tina and the Farmers and Merchants Bank of Hale, did not amount to the dissolution of the Bank of Tina.

Referring again to the provisions of Section 7974, R.S. Mo. 1939, hereinabove mentioned, as possibly being the grounds upon which the Commissioner of Finance takes the position that because of the sale of its property the Bank of Tina is no longer recognized by that Department as a corporate entity, our attention is called to the case of Mercantile Home Bank & Trust Co. vs. U.S., et al., reported in Volume 96, Federal Reporter, Second Series, page 655, in which the terms of said Section 7974, R.S. Mo. 1939, then Section 5379, R.S. Mo. 1929, were construed and applied, in determining whether the sale of the assets of three banks involved in the facts of the case to another bank constituted a consolidation or a merger of the selling banks and the purchasing bank, and, if a consolidation, incidentally, a dissolution of the consolidating corporation would follow. The case grew out of the controversy over whether the bank purchasing the assets of the three other banks became liable as a merged bank, or a consolidated bank, for federal income taxes due the United States Government from one of the selling banks. The United States Circuit Court of Appeals, 8th Circuit, in its decision in the case discussed fully the questions bearing on consolidation and merger and the attendant question of dissolution because of the sale of the assets of the three banks mentioned in the case to the purchasing bank which was one of the parties to the suit, to-wit: Mercantile Home Bank & Trust Co. The Court held that there was no consolidation or merger of the three banks with the purchasing bank by reason of the sale, under the terms of Section 5379, R.S. Mo. 1929 (now our Section 7974, R.S. Mo. 1939, and that the

Honorable Edgar C. Nelson

purchasing bank was not liable for the income taxes of one of the selling banks. The Court also held that there was no dissolution of the banking corporation owing the income taxes, and which sold its assets to the Mercantile Home Bank & Trust Co. because of such sale to the purchasing bank. The Court seems to have based its opinion that there was no dissolution largely, if not entirely, upon a set of existing facts which the Court recites, l.c. 658, with respect to the conduct of the Home Trust Company after the sale, which recital is as follows:

"* * * It continued to make such reports as were required by law to the state and federal authorities. It paid its annual franchise taxes to the State of Missouri and its annual state corporation taxes every year since February 25, 1933. The directors of that company since that time held regular meetings and from time to time held informal meetings for the purpose of determining matters of settlement and sale of real estate."

Said Section 7974 under casual reading would seem to indicate that a bank may sell the whole or any part of its assets, or the whole or any part of its business or departments to any other bank or trust company, state or national, only for the purpose of consolidating or merging with the bank or trust company to which such assets are sold. Thus, the terms of said Section 7974 might very well be somewhat misleading to the Department of Finance so that they might believe that if a bank sold its assets to another bank a consolidation would be thereby effected with the purchasing bank by such sale, and the selling bank would be thereby automatically dissolved. This, as we have shown by the above cited authorities would not be the case. The Federal case just cited and here being discussed, construing said Section 7974, then Section 5379, R.S. Mo. 1929, holds definitely that the sale of the assets of one State bank to another State bank under the terms of what is now our present Section 7974, R.S. Mo. 1939, does not and could not result in a consolidation or merger of the banks, and, therefore, no dissolution of the selling bank. The United States Circuit Court of Appeals in said case in its decision, l.c. 660, further said:

"* * * 'But the mere purchase for money of the assets of one company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation.'

Honorable Edgar C. Nelson

"In Cortland Specialty Co. v. Commissioner, supra, the court was considering the statute with reference to reorganization, merger, or consolidation. In the course of the opinion it is said: 'A sale of the assets of one corporation to another for cash without the retention of any interest by the seller in the purchaser is quite outside the objects of merger and consolidation statutes.'"

We are advised by your Department that the corporation known as the Bank of Tina has, regularly and promptly each year, executed and submitted to your Department the anti-trust affidavit required by the statutes of this State of all such corporations, and that it has promptly paid its annual franchise tax and made its annual registration report, as required by statute, and for the year 1948 tenders such affidavit, report and tax to your Department. This being the case, this bank would come within the terms of the facts described by the Court in the Mercantile Home Bank & Trust Co. case, supra, and is well within its rights by reason thereof to assert that it still has corporate existence.

CONCLUSION

It is, therefore, the opinion of this Department, considering the facts disclosed by your letter and conferences with your Department respecting the sale of the assets of the Bank of Tina to the Farmers and Merchants Bank of Hale, Missouri, that there was no consolidation or merger involved in the transaction. It further appearing that the Bank of Tina having complied with the statutes of this State, or endeavored so to do necessary to maintain its corporate existence, and under the authorities hereinabove cited and quoted, it is our further opinion that the Bank of Tina was not dissolved by reason of the sale of its assets to the Farmers and Merchants Bank of Hale, Missouri, nor for any other cause or reason whatsoever shown by the facts before us but that it still maintains and enjoys its corporate existence under the charter granted it by the State of Missouri. It is the further opinion of this Department that, under the facts and authorities herein contained that you should accept the anti-trust affidavit and annual registration report and the annual corporate franchise tax tendered to your Department by the said Bank of Tina for the year 1948, and for such other years in the future as said corporation may tender them under its present corporate standing.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ELECTIONS:

City Election on tax levy to be held in conjunction with general election on November 2, 1948; proposition for increase in city tax levy in St. Joseph, a first class city, for the purposes specified in Act of January 25, 1946, Laws Mo. 1945, pp. 1286-1288, may be voted upon at November General Election, and election machinery provided for general election may be utilized, including election judges and clerks:

October 11, 1948.

FILED

67

Honorable William B. Norris, Jr.,
Assistant Prosecuting Attorney and
Legal Adviser to the County Court,
County Courthouse,
St. Joseph, Missouri.

10-13

Dear Sir:

We have your letter of September 14, 1948, in which you request an opinion of this department. Your letter is as follows:

"Under the provisions of the Act approved January 25, 1946, (Laws of Missouri, 1945, Pages 1286-1288), all cities of the 1st. class are authorized to levy annually not to exceed 30 cents in the aggregate on the 100 dollars assessed valuation upon all property subject to its taxing powers for any one or more of the following purposes: library, hospital public health, recreation grounds and museum purposes, when such rate and purposes of increase are submitted to a vote of the qualified electors within such cities and a majority voting thereon shall vote therefor, and empowers the common councils of any such cities to call and conduct a special election under the laws governing such as herein contemplated and to submit thereat a proposition for increase of levy at either a special or regular election.

"The common council of the City of St. Joseph is proposing under the authority so conferred to submit two propositions, one for a Garbage disposal program and the other for museum purposes on November 2, 1948 and to utilize the same voting places in each ward and each precinct and, if possible, the same judges and clerks as are used in the general election held on that date. The manner of selection of judges and clerks to serve at elections held in cities of the first class for city purposes differs, of course, from the manner of appointment of such officials to serve at elections held under the general elections laws of the State. In this connection reference is made to section 6254 of the Revised Statutes of Missouri 1939 for the selection

of Judges and Clerks to serve at elections held for city purposes in Cities of the 1st class and to sections 11502 and 11504 regarding the appointment of judges and clerks under the general election laws of the state.

"It is imperative of course that no action should be taken which would in any way endanger the legality of the general election of November 2, 1948 and I would appreciate receiving at your earliest convenience your opinion regarding the following questions:

"(1) Is there any statute, state or federal which in your opinion would prevent the special election mentioned and the general election being held at the same time and at the same voting places?

"(2) May the common council legally select and appoint the same judges and clerks to serve at the special election as are appointed to serve at the general election?

"(3) If so, may such judges and clerks legally serve at the same time and places in dual capacities and receive remuneration from both the City and the County for such services?

"(4) Would the holding of the two elections in question at the same time and places and with the same judges and clerks in any way affect the regularity or validity of the general election of November 2, 1948, provided the general election laws of the state are observed?"

The Act of January 25, 1946, Laws of Mo. 1945, pp. 1286 - 1288, contains among other provisions the following: "The city council of any such cities is hereby empowered to call and conduct a special election under the laws governing such elections as herein contemplated, and to submit thereat a proposition for increase of levy, when, in the opinion of such city council, the necessity therefor arises, and may submit any such proposition at either a special or regular election.* * *" (Underscoring ours.)

We construe the above language to mean that the city council is empowered to follow either one of two courses: (1) It may submit the proposition for an increase in the levy to the voters of the city at a general election, such as the election to be held on November 2, 1948. If it follows this course it is not necessary for the county court either to appoint judges and clerks or to pro-

vide for their compensation, because they have already been appointed in accordance with the terms and provisions of the law applying to general elections. In other words, the Legislature in the aforesaid Act of June 16, 1946, by using the words "and may submit any such proposition at either a special or regular election" made the regular state election, otherwise known as the general election, available to the city for the purpose of obtaining a vote of the people on the increase of the tax levy for the designated purposes.

It is pertinent at this point to call attention to the fact that the term "regular election" has been held by the Supreme Court of Missouri to mean the same as the term "general election." In this connection we quote the following from State of Mo. ex rel. Attorney General, Relator v. Christian Conrades, 45 Mo. 45, l.c. 47: "When applied to election, the terms "regular" and "general" have been used interchangeably and synonymously. The word "regular" is used in reference to the general election occurring throughout the State.* * "

(2) The Legislature also by using said language empowered the city council to call a special election on a different day and in different polling places from the day upon which and the polling places in which the general election is to be held, in which event, of course, it would become necessary to select judges and clerks and provide for their compensation, in accordance with the provisions of the statutes applying to elections of that character.

However, since the city council of St. Joseph plans to submit the intended propositions to the voters of St. Joseph at the general election, as it is given the right to do by the foregoing statute, it is unnecessary to call a special election for the purpose or to provide judges and clerks therefor, or to provide for the compensation thereof. In considering this construction it is important to distinguish between the term "general election" and the term "special election". The weight of authority is that the term "special election" refers to an election held on a date other than the date of the general election. This principle is clearly set forth in the case of Dysart v. City of St. Louis, 321 Mo. 514, l.c. 532, in which the court discussed a similar situation in the following language: "The proposition may be submitted at a 'general election'. It does not say that a special election is to be called on a general election day". Quoting further from the same opinion, l.c. 533, we find the following: "The theory that a proposition, other than election of officers, submitted on the day of a general election is a 'special election', leads to absurd results. Some propositions or amendments are submitted by referendum, some by initiative and some by proclamation of the Governor, etc. If each were a special election we might have a dozen elections on the same day, administered by the same judges and clerks, and the voter would vote in a dozen elections; in several of them

possibly on a single ballot, and the vote on all of them deposited at one and the same time."

Quoting still further from said opinion, l.c. 530, we find the following statement in the opinion of the court: "Respondent contends that a special election is one which takes place at a time different from an election provided for by general law; an election which must be specifically called. This view is supported by what has already been said"; and again quoting from said opinion we set forth the following, l.c. 534: "* * * but the weight of authority favors the definition that a special election means one taking place at a time different from that at which an election is fixed by law".

We believe that the above-quoted language of the Supreme Court thoroughly demonstrates the fact that a proposition such as the proposed proposition in the minds of the councilmen of the City of St. Joseph when submitted at a general election becomes a part of that election and does not become a part of a special election, for the reason among others that a special election is defined by the weight of authority as an election held on a day other than the day of the general election.

We further believe, by reason of the aforesaid provision of the Act of January 25, 1946, that the council of St. Joseph has the right to submit these propositions at the general election rather than at a special election.

CONCLUSION.

We are, therefore, of the opinion that the City Council of St. Joseph, by proper ordinances, may submit the proposition for an increased tax levy to the voters of St. Joseph at the November 2nd General Election, and in so doing is not calling a special election, but is availing itself of another alternative provided by statute, namely, the submission of the question at a regular rather than a special election, and that in so doing it cannot provide additional clerks, because the clerks at the general election are otherwise provided for and have the authority and the duty under the election law to conduct the receiving and the recording of the votes on the said propositions.

In answer to your question 1 in your request for opinion, we are of the opinion that the election on the propositions submitted by the city will not be a special election, but will properly be a part of the general election.

Honorable William B. Norris, Jr.

-5-

In answer to your question 2, we are of the opinion that there is no necessity for the common council to select any judges and clerks, and that it cannot do so because the judges and clerks in the general election will have been already provided. Our answer to your question 2 also answers your questions 3 and 4.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

SMW/LD

SHERIFFS: Sheriff in county of second class may: (1) retain compensation for official services in civil matters not to exceed a yearly sum of \$3900.00; (2) sheriff in second class county may not retain monthly a sum in excess of one-twelfth of \$3900.00; (3) except said sheriff may retain during last month of his official year a sufficient amount as will cause his compensation for the official year to reach the amount of \$3900.00.

December 7, 1948

Mr. William B. Norris, Jr.
Assistant Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

12-9

FILED
67

Dear Sir:

Your opinion request of recent date reads as follows:

"Section 4 of H. B. 939 63rd. General Assembly which was approved April 11, 1946 (laws of Missouri, 1945 Page 1571) provides in part: 'It also shall be the duty of the sheriff to charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that shall accrue to him or his office for official services rendered in civil matters, by virtue of any statute of this state, and all such fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as hereafter provided, less that amount which he is hereinafter authorized to retain.'

"The Sheriff of Buchanan County Missouri has asked me to request your opinion whether he should pay to the County Treasurer the reasonable compensation allowed him by the County Court in accordance with the provisions of Section 11598 R. S. of Missouri 1939 for delivering the ballots to the judges of the election held November 2, 1948, or whether he may retain said compensation in addition to the maximum sum of \$3900 allowed him each year for his official services in civil matters.

"I would appreciate receiving your opinion regarding this matter at your earliest convenience."

Section 11598, R. S. Mo. 1939, provides that the delivery of the ballots in an election shall be made by the sheriff of the county, his deputy, or constable of the township, who shall be allowed a reasonable compensation for his services to be provided for by the county court. This activity by the sheriff is obviously a statutory duty. In 1945 the 63rd General Assembly passed Article 13, Chapter 99, Mo. R.S.A., (Laws of Missouri 1945, pp. 1570-1572) and several sections thereunder relating to compensation of sheriffs in regard to civil matters in counties of the second class. As you state, Buchanan County falls into the category of being a county of the second class. In the Missouri Revised Statutes Annotated, Volume 24, page 133, is found Section 13547.204, which reads, in part, as follows:

"It also shall be the duty of the sheriff to charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and other money that shall accrue to him or his office for official services rendered in civil matters, by virtue of any statute of this state, and all such fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as hereafter provided, less that amount which he is hereinafter authorized to retain. * * * *"
(Underscoring ours.)

For the purposes of this opinion, we are assuming that the delivery of the ballots by the sheriff is a civil matter, and is made mandatory by virtue of a statute of this state. Section 13547.205, page 133, Mo. R.S.A., Volume 24, is the only statute providing for the withholding of any moneys by a sheriff in said Article 13. As seen above, Section 13547.204 authorizes the sheriff to retain certain amounts. This authorization is exclusive, and unless the provision for payment found in Section 11598, R.S. Mo. 1939, is specifically provided for in Article 13, supra, or falls within the provisions of Section 13547.205, no retention of said moneys can be made. In Section 13547.205 it is provided:

"In counties of the second class, the sheriff is hereby authorized to withhold and retain, as compensation for his official services in civil matters,

from the fees, penalties, charges, commissions and other money collected by him for his services in such matters, the sum of \$3900.00 for each year of his official term. * * * *

This portion of the above referred to statute authorizes the sheriff in a county of the second class to accumulate and retain for his official services in civil matters the sum of \$3900.00 for each year of his official term. Said section further provides the method or basis of retention of moneys received by the sheriff, and reads as follows:

"* * * He shall not retain, during any one month, except the last month of each year of his official term, a sum exceeding one-twelfth of the aforesaid \$3900.00, and any amount collected and received in excess of said one-twelfth during any such month, shall be paid by him at the end thereof to the county treasurer. * * * "

Under that portion of the statute, we see that the monthly amount retained by a sheriff for his official services in civil matters cannot be in excess of one-twelfth of \$3900.00 during any month of his official term.

The only exception to this provision is found in the remaining portion of Section 13547.205, supra, wherein it provides a method of retention as to an amount in excess of one-twelfth of \$3900.00 where his pay for official services throughout the year would fail to reach the sum of \$3900.00 without the retention during the last month of his official year of a sum in excess of one-twelfth of \$3900.00. Said remaining portion of Section 13547.205 reads as follows:

"* * * He may, during the last month of any year of his official term, withhold from the amount collected and received by him for services in civil matters during such month, a sufficient amount as will cause his compensation for the official year to reach the sum of \$3900.00. If at the end of any year of his official term, he has not collected and retained the sum of \$3900.00, he may withhold and retain a sufficient amount, from moneys collected

by him in civil matters in the succeeding year of his official term, to cause his compensation for the official year for which he has not received his full compensation, to amount to \$3900.00."

Therefore, we see that whether or not the Sheriff of Buchanan County is authorized to retain the compensation awarded him for the discharge of the duties provided for in Section 11598, supra, is dependent upon whether or not said sheriff has collected moneys aggregating \$3900.00, or whether or not the sum he will collect in his last month of his official year will fail to amount to \$3900.00 without the retention of the "reasonable compensation" provided for in Section 11598, supra. In no event is the sum provided for in Section 11598, supra, a sum over and above and exclusive to the provisions of Section 13547.205, supra.

CONCLUSION

It is, therefore, the opinion of this department that a sheriff in a county of the second class may: (1) Retain compensation for his official services in civil matters not to exceed a yearly sum of \$3900.00; (2) that a sheriff in a county of the second class may not retain monthly for rendering official services in civil matters a sum in excess of one-twelfth of \$3900.00; (3) except said sheriff of a county of the second class may retain during the last month of his official year for official services in civil matters a sufficient amount as will cause his compensation for the official year to reach the sum of \$3900.00.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J.E.*

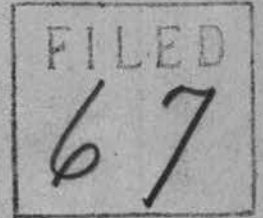
December 22, 1948

COUNTY COURTS:
BUDGET LAW:
CONSTITUTIONAL LAW:

Sec. 18, Art. 6, Constitution, is self-enforcing and county court upon request and charter commission should provide in budget for expense of holding election for approval or rejection of charters and should include in budget actual expenses of the charter commission, such amount to be determined by the county court.

Mr. William B. Norris, Jr.
Legal Advisor to County Court
Buchanan County
St. Joseph, Missouri

12-27



Dear Sir:

This is in answer to your letter of recent date requesting an official opinion of this department and reading as follows:

"The Charter Commission, appointed by the circuit and probate judges of Buchanan County in accordance with the provisions of Art VI, Sec 18 (g) of the Constitution of Missouri of 1945, has suggested to the County Court of this county that the county budget for 1949 include a sum adequate to cover the proposed expenditure for a special election held, as provided in Art VI, Section 18 (h) (i) for the purpose of enabling the qualified electors of Buchanan County to vote upon the charter framed by the Commission. The Charter Commission also has requested the County Court to include in the county budget the sum of \$10,000.00 which is to provide for the payment of necessary expenses of the Commission incurred in connection with the framing of said charter.

"As you are aware, the annual budget for Buchanan County is required to present a complete financial plan for the ensuing budget year. The budget for the year 1949 is now in the course of preparation, and I would appreciate being informed at your earliest convenience whether in your opinion the constitutional provisions relating to the adoption of county charters are self executing and whether the County Court may without any legislative enactment include

in the budget for 1949 the cost of holding the proposed election and may properly appropriate a sum adequate for such purpose.

"I should also appreciate receiving your opinion whether the County Court may without legislative authority properly include in the budget for 1949 and appropriate a sum of money sufficient to cover the actual and necessary expenses incurred by the commission in framing the Charter, and if so, whether the County Court or the Commission shall finally determine what expenses are necessary and the amount thereof. In this connection, it will be noted that Article VI, Section 19 of the Constitution relating to the framing and adoption of charters by cities having over 10,000 inhabitants specifically provides that all necessary expenses of the Commission shall be paid by the city, whereas Art. VI, Section 18 of said Constitution relating to county charters is entirely silent in this regard."

Section 18, Article VI of the Constitution of Missouri, 1945, provides for the framing and adoption of the county charters by any county in this state containing more than 85,000 inhabitants. Such section is a long and complete one and sets out in full detail the procedure for framing and adopting a county charter. The general rule, with regard to whether or not a constitutional provision is self-enforcing, is found in 12 C.J. page 729 and provides as follows:

"Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed."

Such rule was cited with approval by our Supreme Court in the case of State vs. Ellis, 28 S.W. (2d) 363. It is our opinion that Section 18, Article VI of the Constitution is self-enforcing and requires no legislation to put it into effect.

While the Legislature has enacted laws to implement Section 19, Article VI of the Constitution relating to framing of charters by cities containing over 10,000, such laws being found as Sections 1 and 2, Laws of Missouri, 1945, page 1309, we do not believe that such legislative determination prevents Section 18, Article VI of the Constitution being held to be self-enforcing. Section 2 of Laws of Missouri, 1945, page 1309, provides for the Board of Election Commissioners or other officials having charge of municipal elections in cities of over 10,000, to give the notice and determine the form of ballot and details of the election in accordance with the elections laws of the state applicable to such cities.

It is to be noted that Section 18 (i), Article VI of the Constitution provides for the proper body to give the notice of elections as provided for in such section. It is our view that Section 18 (h), providing for the fixing of the date of the election by the Charter Commission and the submission by the Commission in its discretion of alternative sections or articles, read in conjunction with Section 18 (i), provides that the form of ballot must be determined by the officials charged with conducting elections in the county. It is further our view that such election must be conducted in accordance with the general election laws of the state. Therefore, we believe that those matters contained in Section 2, Laws of Missouri, 1945, page 1309, with reference to charters in cities of over 10,000, are sufficiently set out in Section 18 of Article VI, so that such section is self-enforcing.

Under Sections 16 and 17 of Article IX of the Constitution of Missouri of 1875, which were provisions relating to charters of cities of over 100,000 population, the General Assembly in 1887 enacted some 54 sections and provided in Section 5, Laws of Missouri, 1887, page 43, with relation to the form of the ballot, as follows:

" * * * At such election the form of the ballots may be 'for the charter,' followed by sufficient space to the right thereof, on which may be written or printed the words 'yes' or 'no,' in accordance with the choice of the person voting such ballot. In the event of any alternative section or article being presented for the choice of the voters, any form of ballot may be used which will clearly indicate the choice of the person voting such ballot between such alternative sections or articles."

The courts have upheld a charter of Kansas City adopted under such constitutional provisions and laws. Since the provisions found in Section 18 of Article VI are as sufficient in regard to the form of the ballot at a charter election as were such laws, it is our view that such constitutional provision is self-sufficient and needs no laws to carry it into effect.

Since the cost of holding county elections is one enjoined upon the counties, we believe it to be clear that upon request of a Charter Commission properly appointed, the county court must include in its budget an amount sufficient to pay the expenses of an election, the date of which is to be set by the Charter Commission in its budget. In the case of Lancaster vs. County of Atchison, 180 S.W. (2d) 706, the Supreme Court, in discussing the powers of counties, said l.c. 708:

"Both parties to this suit agree that counties, like other public corporations, can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. * * * *"

From the provisions of Section 18 of Article VI of the Constitution providing that the Charter Commission is to frame a charter to be voted upon by the people, we believe it to be one of the incidental powers of the county to pay the expenses necessarily incurred in framing such a charter. In the case of Rinehart vs. Howell County, 153 S.W. (2d) 381, the Supreme Court held that necessary expenses incurred by a prosecuting attorney in the discharge of his official duties should be paid by the county. We believe the rule to be equally applicable here and hold that the expenses necessarily incurred by the Charter Commission in framing a charter for Buchanan County should be included in the county budget. However, the necessary expenses of the Charter Commission and the amount to be budgeted for such necessary expenses is a matter to be determined by the county court. We believe the fact that Section 18 of Article VI of the Constitution is silent with regard to the payment of necessary expenses of the Charter Commission, while Section 19 of Article VI, relative to city charters, provides that the necessary expenses of the Commission are to be paid by the city, does not make it any the less the duty of the county to pay the necessary expenses of such Commission as such necessary expenses are determined by the county court.

CONCLUSION

It is the opinion of this department that Section 18 of Article VI of the Constitution of Missouri, 1945, is self-enforcing. It is further the opinion of this department that when requested by the County Charter Commission, it is the duty of the county court to include in its budget a sum sufficient for defraying the expense of an election held for the acceptance or rejection of a charter framed by such Commission. It is further the opinion of this department that the necessary expense of such Commission in framing a charter should be included in the county budget and that the amount of such necessary expense is to be determined by the court.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

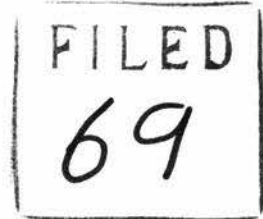
J. E. TAYLOR
Attorney General

CBB:VLM

PROBATE COURTS: Further insanity hearing not necessary when
INSANE PERSONS: pay patient made county patient.

January 15, 1948

Honorable T. L. Parrish
Judge of the Probate Court
Cole County
Jefferson City, Missouri



Dear Judge Parrish:

This is in reply to your letter of recent date requesting an opinion from this department, which reads as follows:

"I would like to obtain an opinion for judgment of insanity where a person has been a private patient in the hospital and his funds run out and they want to be put on the county. The question is, does this Court have to have a hearing and adjudge them insane, and the County pay the expenses?"

The support and expenses of an insane person admitted to a state hospital for the insane shall be paid for out of the estate of such insane person. However, if such insane person shall, at any time, come under the classification of "insane poor persons," such person shall be maintained at such hospital by the proper county. Section 501, R.S. Mo. 1939.

The question presented concerns the proper procedure by which a pay patient in a state hospital for the insane is made a county patient. If the probate court of the proper county finds that a pay patient has not estate sufficient to support him at such hospital, said court may order a certificate setting forth this fact transmitted to the superintendent of such hospital. Upon receipt of such certificate by the superintendent, the patient is considered a county patient and, as such, shall thereafter be supported by the proper county. See The State ex rel. Yarnell v. Cole County Court, 80 Mo. 80.

Section 9346, Laws of Missouri, 1945, page 912, provides:

"If the probate court of the proper county shall so order, the clerk thereof shall

Honorable T. L. Parrish

transmit to the superintendent a certificate, under his official seal, setting forth that any patient in a state hospital has not estate sufficient to support him therein. Upon the receipt of such certificate by the superintendent, such person shall be a county patient of such county, and shall be supported by such county, as provided by this article in the cases of poor patients."

The order of the probate court, when certified to the superintendent of the state hospital, is binding on the county and is all that is required to make a pay patient a county patient. Therefore, a further insanity hearing is unnecessary.

CONCLUSION

In view of the foregoing, it is the opinion of this department that a further insanity hearing is not required when it becomes necessary for a pay patient in a state hospital for the insane to be transferred to county expense.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

2120
COUNTY MEMORIAL HOSPITAL: Private or pay patients are eligible for admission into a county memorial hospital or a memorial addition to an existing county hospital.

May 19, 1948

FILED

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5-20
Honorable Tom Proctor
Missouri State Representative
Greenfield, Missouri

Dear Mr. Proctor:

Your letter of recent date requesting the opinion of this department for the interpretation of House Bill No. 756 of the 63rd General Assembly, and Senate Bill No. 322 of the 64th General Assembly, reads as follows:

"We contemplate building a hospital here in Dade County. Of course we aim to use the \$10,000.00 as provided for in Senate Bill 322 and House Bill 756.

"Now we desire the opinion of your office as to whether a county in building and maintaining a County Hospital as provided for under House Bill 756 and Senate Bill 322 would be permitted to admit private or paid patients."

The questions presented by your letter are:

1. Can private or pay patients be admitted to a county hospital under House Bill No. 756, passed by the 63rd General Assembly and approved April 10, 1946, as found at pages 983-986, inclusive, Laws of Missouri, 1945?

2. Can private or pay patients be admitted to a county memorial hospital, or a memorial addition to an existing county hospital, as provided for in Senate Bill No. 322, passed by the 64th General Assembly and approved April 13, 1948?

House Bill No. 756, supra, as approved, repealed Sections 15192 to 15197, both inclusive of Article 4, Chapter 126, R. S. Mo. 1939, and reenacted in lieu thereof four new sections to be known as Sections 15192 to 15195, both inclusive. Section 15193 of the above approved House Bill, Laws of Missouri, 1945, was repealed by House Bill No. 24, passed by the 64th General Assembly and approved July 7, 1947, and two new sections were

enacted in lieu thereof, to be known as Sections 15193 and 15193a, Laws of Missouri, 1947, page 323. These new sections, together with Sections 15198 to 15209, both inclusive, R. S. Mo. 1939, constitute now Article 4, Chapter 126, R. S. Mo. 1939.

Section 15192, page 984, Laws of Missouri, 1945, in part reads:

"The county courts of the several counties of this state are hereby authorized, as provided in this Article, to establish, construct, equip, improve, extend, repair and maintain public hospitals, * * * *"

Section 15193, Laws of Missouri, 1947, page 323, provides that the county court shall appoint five trustees chosen from the citizens at large, with reference to their fitness for such office, all residents of the county, not more than three of said trustees to be residents of the city, town or village in which said hospital is to be located, who shall constitute a board of trustees of said public hospital.

Section 15202, R. S. Mo. 1939, provides that:

"Every hospital established under this article shall be for the benefit of the inhabitants of such county and of any person falling sick or being injured or maimed within its limits, but every such inhabitant or person who is not a pauper shall pay to such board of hospital trustees or such officer as it shall designate for such county public hospital, a reasonable compensation for occupancy, nursing, care, medicine, or attendants, according to the rules and regulations prescribed by said board, * * * *"

(Underscoring ours.)

The above section specifically provides for admitting patients to county public hospitals who are not paupers and who shall pay reasonable compensation for the benefits received therein. House Bill No. 756, Laws of Missouri, 1945, did not change Section 15202, R. S. Mo. 1939, and, therefore, private or pay patients can be admitted to a county public hospital.

Referring to Senate Bill No. 322, approved April 13, 1948 (by a joint resolution of the Legislature will become effective July 19, 1948, being 90 days after recessing of Legislature for more than 30 days), in its true meaning provides for a monument to be erected in memory of the service men and women of our state and country of World War II, and provides that this monument shall be in the form of a county memorial hospital, or a memorial addition to an existing county hospital. Section 1 of this bill provides that upon certification to the Governor by the county court that such county has available an adequate sum of money to be used for the purchase or erection and the operation of a county memorial hospital or a memorial addition to an existing county hospital commemorating the services of our armed forces during World War II, then such county shall be eligible to receive state financial aid to build such a memorial hospital or a memorial addition to an existing county hospital, which has been certified to the Governor by the director of the division of health and is, in his judgment, in the interest of public health and welfare. Without making reference to the limitation of the use of such memorial, except that such memorial shall be a hospital for the interest of public health and welfare, we think that Senate Bill No. 322 should be read in connection with the sections in Article 4, Chapter 126, R. S. Mo. 1939, and the amendments thereto.

We are unable to interpret the action of the Legislature in passing these new sections to restrict or limit the type of patient who shall be admitted to the county memorial hospital or to a memorial addition to an existing county hospital, and when the same has been completed and dedicated to its purpose, the intent of Senate Bill No. 322, supra, has for all practicable purposes been complied with, and the use of said memorial would be under the rules and regulations now prescribed in Article 4, Chapter 126, R. S. Mo. 1939, as amended, applying to county public hospitals, and we do not think that the Legislature intended that private or pay patients should be prohibited from being admitted into such hospital.

CONCLUSION

Therefore, it is the opinion of this department that private or pay patients are eligible for admission into a county memorial hospital, or a memorial addition to an existing

Hon. Tom Proctor

-4-

county hospital, erected in accordance with Senate Bill No. 322, passed by the 64th General Assembly and approved by the Governor on April 13, 1948, effective July 19, 1948.

Respectfully submitted,

GORDON P. WEIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *TB*

GPW:VLM

MUNICIPALITIES:

STREETS:

TRAFFIC REGULATIONS:

Kansas City may enact ordinances providing for reversible lanes for expediting traffic on Broadway from Linwood to Westport Avenue.

July 8, 1948

FILED

72

Honorable David M. Proctor
City Counselor
28th Floor, City Hall
Kansas City 6, Missouri

7-12

Dear Sir:

This is in reply to your letter of recent date, wherein you request an opinion from this department on the question of the authority of the City of Kansas City, under state statutes, to establish a "reversible lane" for traffic on Broadway from Linwood Boulevard to Westport Avenue.

The state statutes applicable, and to which you refer in your letter, are Section 8385, R. S. Mo. 1939, sub-section (c) of which provides as follows:

"(c) An operator or driver meeting another vehicle coming from the opposite direction on the same highway shall turn to the right of the center of the highway so as to pass without interference."

Also Section 8395, R. S. Mo. 1939, as amended in Laws of Missouri, 1943, page 660, sub-section (b) of which provides as follows:

"(b) Municipalities may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; establish one-way streets and provide for the regulation of vehicles thereon; require vehicles to stop before crossing certain designated streets and boulevards; limit the use of certain designated streets and boulevards to passenger vehicles; prohibit the use of certain designated streets to vehicles with metal tires, or solid rubber tires; regulate the parking of vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical and prohibit or control left-hand turns of vehicles; require the use

of signaling devices on all motor vehicles, and prohibit sound-producing warning devices, except horns directed forward. No ordinance shall be valid which contains provisions contrary to or in conflict with this article, except as herein provided."

Section 31-37 of the Revised Ordinances of Kansas City for 1946, provides in part as follows:

"Upon all streets of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the roadway except when the right half is out of repair and for such reason impassable, or when overtaking and passing another vehicle, subject to the limitations set forth in section 31-41.

"In driving upon the right half of a roadway, the driver shall drive as closely as practicable to the right-hand edge or curb of the roadway except when overtaking or passing another vehicle or when placing a vehicle in a position to make a left turn."

Section 31-39 of said Ordinances provides as follows:

"On all streets divided by a parkway, walk, medial strip, sunken way or viaduct, vehicles shall keep to the right of such divisions."

Broadway being one of the boulevards of the City of Kansas City, the control of traffic thereon is vested in the council and park board. Under Section 55 of Article 3 of the charter of the City of Kansas City, Revised Ordinances of 1946, page 120, it is provided as follows, in part:

" * * * The council shall have power, and it shall be its duty upon recommendation of the board, to pass ordinances for the regulation and orderly government of parks, parkways, boulevards and public grounds, and to prescribe fines and penalties for the violation of such ordinances. The council, upon recommendation of the board, may regulate the traffic on all boulevards,

parkways and highways under its control, and, upon like recommendation, it may regulate the kind and character of all vehicles used on or passing over the same, and the width and kind of tires used thereon, and may exclude heavy traffic or any kind of vehicle used or operated for commercial purposes from boulevards, parkways and parks. * * * * *

This charter provision vests in the council, on recommendation of the park board, authority to pass ordinances regulating traffic on boulevards, etc. Pursuant to this authority, ordinances providing for speed regulation, parking, control and movement of traffic on boulevards have been enacted. Sections 31-37 and 31-39, supra, are examples of ordinances enacted under the foregoing authority.

Section 31-97 of said Revised Ordinances imposes a penalty on a person who operates a vehicle on certain boulevards in the opposite direction of that designated for the movement of traffic.

A one-way traffic arrangement, such as you have described in your letter, would appear to be in conflict with Section 8385, supra, which requires persons, when operating motor vehicles, to keep as near the right-hand side of the highway as practicable. However, such arrangement would be legal if the statutes, charter and ordinances of cities make exceptions to traffic in such cities.

Kansas City is organized and operated under a special charter, and from an examination of the charter and ordinance provisions referred to herein, it appears that provisions for one-way traffic on certain streets and boulevards have been made.

Under Section 19 of Article VI of the Constitution of Missouri, 1945, cities containing a population of over 10,000 inhabitants may adopt a charter for their own government. This charter, so adopted, must be consistent with and subject to the Constitution and laws of the state. This section of the 1945 Constitution, with the exception of some amendments, not pertinent here, was brought down from the Constitution of 1875, Section 16, Article IX.

In the case of State ex rel. vs. Jost, 265 Mo. 51, the court held that the charter of Kansas City is subject to the laws of the state in all matters of state concern.

In the case of *Kansas City vs. Field*, 194 S.W. 39, the court, in discussing the question of the application of state laws to Kansas City, said, 1.c. 41:

" * * * It is self-evident that since Kansas City is in Jackson county and therefore an integral component of the state of Missouri, the general laws of the state run there, and will control unless the Constitution or other laws passed pursuant thereto have abdicated this right of control. * * * "

In Volume 25, Am. Jur., page 548, Section 255, under the subject of powers of municipalities and other local authorities over highways, we find the following rule which has been applied in Missouri:

" * * * As a general rule, however, in this country the control and supervision of streets and other public ways is, to a greater or less extent, delegated to the local governmental authority. * * * "

In the case of *Ferrenbach et al. vs. Turner et al.*, 86 Mo. 416, 419, the court, in treating the question of the authority of the City of St. Louis over streets, said:

" * * * The legislature represents the public at large, and has paramount authority over all public highways, no matter how acquired. This authority may be, and is, to a large extent, delegated to the city of St. Louis over the streets therein. * * "

The Missouri lawmakers, recognizing the above principle as a policy of the state, enacted said sub-section (b) of Section 8395, Laws of Missouri, 1943, page 659, hereinabove set out.

In discussing the authority of a city over its streets under this section, the court, in the case of *Wilhoit et al. vs. City of Springfield*, 171 S.W. (2d) 95, said, 1.c. 98:

"That cities have the authority to regulate parking under its police power is not open to question so long as they are not unreasonable in their regulatory measures. *Baker v. Hasler*, 218 Mo. App. 1, 274 S.W. 1095. They

may designate streets or parts of streets within its limits upon which parking shall either be prohibited absolutely or else restricted to a limited time; 'and so long as the ordinance is reasonable and necessary for the public safety, the courts will have no recourse but to enforce it, if no other obstacle to its validity exists.' * * * "

Also in the case of State ex rel. Audrain County vs. City of Mexico, 197 S.W. (2d) 300, the question there under consideration was whether the City of Mexico had authority to erect parking meters on the street around and adjoining the Courthouse. In speaking of the police powers of the cities in such cases, the court said, l.c. 303:

" * * * Municipal corporations are the result of a voluntary association of the inhabitants sanctioned by the State primarily for the purpose of local self-government subordinate to the State and at the same time constituting, although secondary, an effective instrumentality for the administration of governmental affairs. A charter, defining their powers and duties, is essential to their creation and existence, which is effected upon 'incorporation.' Cities have been a chief factor in human progress. They exercise policy making authority and have legislative powers for their local government. * * * * * The indispensability of local self-government arises from problems implicit in the safety, order, health, morals, prosperity, and general welfare of thickly populated areas. * * * * * The jurisdiction of the city attaches and that of the county ceases when rural or county territory is annexed to a municipality. * * * * * Within its authorized sphere of action, a city has been termed 'a miniature state.' Paulsen v. City of Portland, 149 U.S. 30, 38, 13 S. Ct. 750, 753, 37 L. Ed. 637. This policy of government has received practical recognition by the General Assembly of Missouri.

"The State of Missouri has delegated to the City of Mexico as a city of the third class authority to prevent the obstruction of its sidewalks and streets by vehicles (Sec. 6952, R. S. 1939, Mo. R.S.A.) and,

along with other cities of the State, specific authority to ' * * * by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; * * * regulate the parking of vehicles on streets by the installation of parking meters for limiting the time of parking and exacting a fee therefor or by the adoption of any other regulatory method that is reasonable and practical * * *.' Laws 1943, pages 659-661, amending Sec. 8395, R. S. 1939, Mo. R. S.A. Said Sec. 8395 is a part of Art. I of Chap. 45, R. S. 1939, Mo. R.S.A. Section 8366 thereof provides in part: 'This article shall be exclusively controlling on the * * * regulation * * * of motor vehicles, their use on the public highways' et cetera. And Sec. 8367, Id., entitled 'Definitions,' defines 'Highway' as: 'Any public thoroughfare for vehicles, including state roads, county roads and public streets, avenues, boulevards, parkways or alleys in any municipality.'"

In addition to the authority granted to a municipality by sub-section (b) of Section 8395, supra, to establish one-way streets, it is provided that they may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions. Therefore, it would seem that the City of Kansas City, by virtue of the authority under its charter and the authority under Section 8395, supra, would be authorized to enact ordinances regulating traffic on Broadway, providing for "reversible lanes" thereon and fixing the hours in which traffic may be required to travel in certain directions, subject to such ordinances and regulation being reasonable.

CONCLUSION

It is, therefore, the opinion of this department that the City of Kansas City has authority, under the state statutes, to establish a "reversible lane" for traffic on Broadway from Linwood Boulevard to Westport Avenue, subject to such ordinances and regulation being reasonable.

Respectfully submitted,

APPROVED:

TYRE W. BURTON
Assistant Attorney General

J. E. TAYLOR
Attorney General

TWB:VLM

*Copy to
J. D. Smith
Lately*

CIRCUIT CLERKS: Circuit clerk's and recorder's fees
RECORDERS: collected under provisions of House
FEES: Bill No. 65 of the 64th General Assembly
must be turned into the county treasury.

July 16, 1948

FILED

73

7-23

Mr. B. E. Ragland
Chief Clerk
State Auditor's Office
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for an opinion, which reads as follows:

"We have received several requests for information from circuit clerks and recorders concerning the fees to be collected for performing the duties outlined in House Bill No. 65, passed by the 64th General Assembly and approved May 10, 1948.

"Will you kindly give us an opinion as to whether or not the fees provided for by House Bill No. 65 are accountable fees?"

The fees of which you speak above are contained in Sections 35 and 37 of House Bill No. 65, and read as follows:

"Section 35. Every officer authorized to issue marriage licenses shall be paid a recording fee of fifty cents for each marriage certificate filed with him and reported by him to the state registrar. The recording fee shall be paid by the applicant for the license and be collected together with the fee for the license.

"Section 37. The clerk of the court shall be paid fifty cents for each certificate prepared and forwarded by him to the state

registrar as above provided which shall be taxed as costs in the case in which the decree was rendered."

In the above-quoted sections you will notice that the fees provided for have not been designated by the Legislature as nonaccountable fees. In the absence of such direction, we must look to see if they can be so considered by other general laws of the Legislature.

In counties of the second class the Legislature has provided by Section 13408.2, Mo. R.S.A., 1939, for the clerk of the circuit court to receive as compensation for his services a sum of \$4,000 annually.

Section 13408.7, Mo. R.S.A., 1939, provides that "The clerk of the circuit court shall pay monthly into the county treasury the amount of all fees collected by virtue of his office and due the county, and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law."

Section 13547.220, Mo. R.S.A., 1939, establishes compensation not to exceed \$4,000 annually for recorders in counties of the second class, paid out of the fees received by him.

Section 13547.221, Mo. R.S.A., 1939, provides that "All fees, charges and moneys collected by the recorder of deeds in excess of the amount to which he is entitled for compensation as herein provided, shall be the property of the county."

In counties of the third class wherein there is a separate circuit clerk and recorder, Section 13408.8, Mo. R.S.A., 1939, provides for an annual salary for the circuit clerk, while Section 13408.10, Mo. R.S.A., 1939, provides: "And monthly, such clerks shall pay into the county treasury the amount of all fees collected by virtue of his office and every clerk shall be liable on his official bond for all fees collected and not accounted for by him as provided by law."

Section 13187.1, Mo. R.S.A., 1939, provides: "The recorder in counties of the third class, wherein there shall be a separate circuit clerk and recorder, shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and

all fees received by him, over and above the sum of \$4000 except those set out in Section 2 hereof, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

The exception provided for in Section 13187.2, Mo. R.S.A., 1939, does not pertain to House Bill No. 65.

Section 13408.13, Mo. R.S.A., 1939, provides for an annual salary for the circuit clerk and recorder in counties of the third class wherein the two offices have been combined, while Sections 13408.15 and 13408.16, Mo. R.S.A., 1939, provide that the fees accruing to the office of recorder and circuit clerk shall be paid into the county treasury monthly.

Section 13408.20, Mo. R.S.A., 1939, provides an annual salary for the circuit clerk and recorder in counties of the fourth class, while Sections 13408.22 and 13408.23, Mo. R.S.A., 1939, provide that all fees accruing to the office of recorder and circuit clerk shall be paid monthly to the county treasurer.

In the laws mentioned above there has been expressly excluded all fees earned by the circuit clerk in cases of change of venue from other counties. Thus, it is seen that the Legislature has prescribed that the method of payment of recorders and circuit clerks shall be by salary, and it has abolished the fee system with an exception in the cases of change of venue and that provided for in Section 13187.1, supra.

It has long been the law in this state that "If the statute provides compensation in a particular mode or manner, then the officer is confined to that manner and is entitled to no other or further compensation or to any different mode of securing same. Such statutes, too, must be strictly construed as against the officer. * * * It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment." *Nodaway County v. Kidder*, 129 S.W. (2d) 857, 860.

In the instant problem before us, the Legislature has provided a manner of compensation for recorders and circuit clerks, i.e., by annual salary. In adopting this manner of payment it has provided for an exception in the case of fees derived in cases of change of venue.

It has long been a rule for the construction of statutes that the express mention of one thing in a statute implies the exclusion of another thing, generally called the doctrine "expressio unius est exclusio alterius." It is also a rule of construction of statutes that the Legislature is presumed to know the state of law as it exists at the time of the passage of an act and also the construction which has been placed upon the law by the courts. *Howlett v. Social Security Commission*, 149 S.W. (2d) 806, 811.

In House Bill No. 65 the Legislature has provided additional duties for recorders and circuit clerks. In the case of *State v. Nolte*, 180 S.W. (2d) 740, the court said:

" * * * Extra compensation for extra services must be expressly authorized. See *Nodaway County v. Kidder*, 344 Mo. 795, 129 S.W. 2d 857. Extra duties do not automatically bring extra compensation. *Bates v. St. Louis*, 153 Mo. 18, 54 S.W. 439, 77 Am. St. Rep. 701; *Gannon v. Lafayette County*, 76 Mo. 675."

Therefore, in the construction of House Bill No. 65 it must be presumed that the Legislature knew that the imposition of the extra duties upon the recorders and circuit clerks would not automatically bring extra compensation to them personally. If the Legislature had so intended, it could have expressly provided therein for the extra compensation to be treated in the same manner as the fees in cases of change of venue. It is not for us to determine the propriety of matters which properly pertain to the legislative branch of the government. If the Legislature desires to burden recorders and circuit clerks with additional duties without additional compensation, that is the prerogative of the Legislature.

Conclusion.

It is the opinion of this department that the Legislature, by enacting House Bill No. 65 and failing to specifically provide that the fee should accrue personally to the recorders and circuit clerks, meant that these fees should be treated as others and turned into the county treasury as provided by law.

Respectfully submitted,

APPROVED:

JOHN R. BATY
Assistant Attorney General

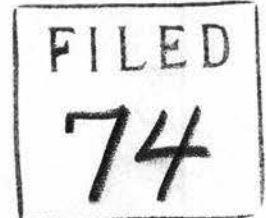
J. E. TAYLOR
Attorney General

SCHOOLS: Tuition cannot be paid for elementary pupils voluntarily attending other districts and such pupils cannot be counted toward teaching units.

January 17, 1948

F I L E D 74

Mrs. Ada Reynolds
County Superintendent
Huntsville, Missouri



Dear Mrs. Reynolds:

We have your letter of recent date which reads as follows:

"I have a family who owns property in Clark, Missouri. This family has two school children. From Monday to Friday they live in a rented apartment in Centralia, Missouri, where their children attend school. The father attends Missouri University and the mother teaches a rural school near Centralia, hence; the reason for maintaining the apartment in Centralia. The family returns to Clark and spends each week end. Please inform me whether the Clark school district can legally pay the tuition on these children and receive their attendance count back in their district for a teaching unit, or whether these children should be counted as resident pupils in the Centralia district?"

A subsequent letter from you in answer to a request from us for further information reads as follows:

"In my request for an opinion of December 2, 1947, the children referred to are elementary children. These children have not been assigned to the Centralia District by me."

We find no provision in the law for paying the tuition of elementary pupils who attend the school of another district under circumstances outlined in your letter.

Under Section 10461, R. S. Mo. 1939, when elementary pupils are assigned by the County Superintendent to an adjoining district which is more accessible to them, the Board of Directors of the district in which such pupils live are required to pay the tuition of such pupils in the district which they attend. Under Section 10324 of the statutes, Boards of Directors are authorized to pay the tuition of elementary pupils of their district who attend other school districts under arrangements with the sending district, when the enumeration of the sending district is less than 25. Under Section 10464 of the Statutes when an average daily attendance of a district is less than 15 for the preceding school year, the Board of Directors may be required by the State Board of Education to pay the tuition of the pupils of said district to another district. We find no provision, however, which authorizes the Board of Directors to pay the tuition of some of its resident pupils who voluntarily attend another district in the state.

The second part of your inquiry is whether the pupils you mention in your letter can be counted in the Clark district for the purpose of determining the number of teaching units of the Clark district. Section 10456, RSMo 1939 provides in part as follows:

"Teaching units shall be allotted to each and every district on the basis of the average daily attendance in such district during the preceding year. Elementary teaching units shall be determined on the basis of the average daily attendance of the pupils below the ninth grade. High school teaching units shall be determined on the basis of the average daily attendance of pupils above the eighth grade and not above the twelfth grade. Except as hereinafter provided, elementary teaching units shall be determined for each and every district in accordance with the following schedule: Not more than thirty pupils in average daily attendance, one teaching unit; more than thirty but not more than sixty pupils in average daily attendance, two teaching units; more than sixty but not more than ninety pupils in average daily attendance, three teaching units; more than ninety but not more than one hundred and twenty pupils in average daily attendance, four teaching units;

more than one hundred and twenty but not more than one hundred and fifty pupils in average daily attendance, five teaching units; more than one hundred and fifty but not more than one hundred and eighty pupils in average daily attendance, six teaching units; more than one hundred and eighty pupils but not more than two hundred and ten pupils in average daily attendance, seven teaching units; more than two hundred and ten but not more than two hundred and forty pupils in average daily attendance, eight teaching units; more than two hundred and forty pupils in average daily attendance, one teaching unit for each thirty-two pupils or major fraction thereof. * * * In computing the teaching units for a given year, attendance data for the preceding school year shall be used. * * * "

It will be seen by the foregoing statute that teaching units are determined by the average daily attendance in a district during the preceding year. Teaching units are not determined in the Clark district by the number of pupils who are resident in the district, but it is determined by the number of pupils who attend school in the district. Since the pupils you mention in your letter do not attend school in the Clark district, they would not be counted in determining the number of teaching units to which that district is entitled.

Conclusion

It is, therefore, the opinion of this office that a school district cannot pay the tuition of elementary pupils of said district who voluntarily attend school in another district in the state, and that elementary pupils of one district who do not attend school in their own district cannot be counted in their district for the purpose of determining the number of teaching units to which their district is entitled.

Yours very truly,

HARRY H. KAY
Assistant Attorney General

Approved:

J. E. TAYLOR
Attorney General

SCHOOLS:

COUNTY SUPERINTENDENT: }

meals and lodging are a part of county superintendent's traveling expenses, and mileage shall be allowed for travel outside his county.

February 19, 1948

FILED

75

2/20

Honorable James T. Riley
Prosecuting Attorney
Jefferson City, Missouri

Dear Mr. Riley:

We have your letter of recent date which reads as follows:

"I have been requested to secure your opinion and interpretation regarding the travelling expenses allowed county superintendents of schools, under Section R.S. Mo. 10618.2 as amended by Laws of Missouri, 1945, page 1709.

The above section provides that the county superintendent shall receive 4¢ per mile for each mile travelled. In addition to the mileage payment, is the superintendent entitled to be paid for meals and lodging?

Is the superintendent entitled to claim mileage for travel outside of his county, while attending meetings and conventions?

Your opinion on the above, respectfully requested."

The section of the statutes to which you refer in your letter (Laws 1945 p. 1709, Section 2) reads in part as follows:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. * * * The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. * * * Provided, when the county superintendent shall furnish his own

conveyance, the rate allowed for mileage shall be four cents per mile for each mile actually and necessarily traveled. * * * *

By the above section, the county superintendent is entitled to be reimbursed for his "actual and necessary traveling expenses." To answer the first question submitted in your letter, it is, therefore, necessary to determine whether amounts expended by the County Superintendent for meals and lodging constitute actual and necessary traveling expenses. We must first determine whether they are a part of traveling expenses.

We do not find any cases in Missouri where the courts have ruled upon this precise question. However, we have found cases from other states in which this exact question has been before the courts. In *Van Veen v. Graham County*, 108 Pac. 252 (Ariz.), the Court was considering a statute which provided that the Court Reporter should be allowed his "actual traveling expenses in attending the district court away from his official residence." The reporter was claiming his board and lodging expenses as part of his actual traveling expenses, and the county was refusing to pay for these items, contending that they were not traveling expenses. In disposing of the case, the Supreme Court of Arizona said, l.c. 252:

"Our attention has not been called to any case in which the expressions 'actual traveling expenses' or 'traveling expenses' have been defined. The statutory provision above quoted is substantially the same as that contained in paragraph 1488, c. 19, of the Revised Statutes of 1901, which provides that he shall receive 'his actual traveling expenses in attending any district court.' Ever since the enactment of the 1901 provision, we are advised that it has been the uniform practice of district attorneys and boards of supervisors throughout the territory to construe the words 'actual traveling expenses' as including the board and lodging of the reporter during his attendance upon terms of court away from his home. In the absence of judicial construction of this or any similar statutory provision, the long-continued practical construction given to it by these officers is entitled to great,

if not controlling, weight. Avery v. Pima County, 7 Ariz. 26, 60 Pac. 702; Copper Queen, etc., Mining Co. v. Territorial Board, 9 Ariz. 383, 84 Pac. 511; U. S. v. Johnston, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389; U. S. v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890. Presumptively the Legislature which enacted the statute of 1907 was aware of the construction theretofore uniformly given the statute of 1901, and was satisfied therewith, or it would have changed it in the enactment of 1907, and the use by it of the words 'actual traveling expenses' may fairly be deemed an adoption of such construction. Copper Queen, etc., Mining Co. v. Territory, supra; U. S. v. Finnell, supra. We think the demurrer should have been overruled, and judgment rendered for the amount prayed upon the stipulated facts."

Likewise, in the case of State ex rel. v. McClure, 143 Pac. 477 (N. Mex.) the Court was considering a statute which provided "that the actual traveling expenses of district attorneys, incurred while in the discharge of their duties, shall be paid by the county in behalf of which same are incurred." The district attorney was claiming board and lodging as part of his actual traveling expenses, and the county was refusing to pay these items. In deciding the case, the court said, l.c. 478:

"* * * It was apparently the intention of the Legislature to reimburse district attorneys for actual traveling expenses, by which we understand that the Legislature intended to reimburse such officials for all actual expenses incurred by them while away from their usual abode, resulting from the necessity of their absence while engaged in the public business. While this opinion is limited to the question of whether or not items for board and lodging are to be included within the actual traveling expenses, and is not to be given a broader construction, we are clearly of the opinion that such items are proper charges against the several counties, when the same arise by reason of necessity of the district attorney's traveling upon public business of the counties against whom the charge is made. We therefore hold that the provisions of section 1, c. 54, Laws of 1913, allowing district

attorneys their 'actual traveling expenses' incurred while in the discharge of their duties, authorize the allowance to such district attorneys for board and lodging in the place where the district attorney contracts such expenses other than at his usual place of abode, provided such expense be incurred while such district attorney is in the discharge of official duties, to be paid by the county in behalf of which such expense is incurred, upon order of the court, to be supported by sworn statement of such items of expense."

The above cases are the only ones we have found which are directly in point except the case of State ex rel. v. Lagrave 42 Pac. 797 (Nev.). In the latter case the court held that board and lodging of the superintendent of public instruction were not a part of actual traveling expenses of that office. The Court reasoned that after an officer arrived at a place he was not "traveling". This was indeed a narrow view, and it is not in harmony with the other cases cited above. Evidently the Legislature of Nevada did not concur in the reasoning of the court in that case because it subsequently passed a statute expressly including "the cost of living, while absent from their places of residence" as part of the traveling expenses of each deputy superintendent of public instruction (L. Nev. 1911, c. 133).

We think there is no question but what the reasoning of the courts in the Arizona and New Mexico cases, above cited, is the correct reasoning. Public officials in Missouri have over a long period of time considered board and lodging as a part of the traveling expenses of public officials and employees, and such interpretation is entitled to great weight in deciding the question which you raise. It is hard to see how it could be contended that a man's board and lodging while away from home was not a part of his expenses of travel. One cannot travel without eating, and it is often necessary to secure lodging before a trip is completed. If, therefore, an officer is entitled under the law to his traveling expenses, he is certainly entitled to his food and lodging while on his trips.

Before traveling expenses could be said to be "necessary", the county superintendent would have to be traveling in the performance of duties enjoined upon him by law. He is required to travel in the performance of many of his duties. For instance, under

Section 10612, R.S. Mo. 1939, he is required to visit schools. Under Section 10613, L. 1945, p. 1675, the county superintendent is required to hold public meetings at different points in the county each year, and under Section 10617, L. 1945, p. 1676, the county superintendent is required to attend annual conventions called by the State Board of Education. The foregoing illustrations are examples of the necessity of the county superintendent traveling in the performance of his duties.

Your second question is whether or not the county superintendent is entitled to claim mileage for traveling outside of his county while attending meetings and conventions.

As pointed out above, the county superintendent is required to attend annual conventions called by the State Board of Education. These would likely be in counties other than his own. It would, therefore, be necessary for him to travel in order to get to these conventions. Section 2, Laws 1945, p. 1709, above cited, provides that the county superintendent shall be allowed his actual and necessary traveling expenses and provides that when he furnishes his own conveyance the rate allowed for mileage shall be 4¢ per mile. Said section does not limit the mileage allowance to travel within the county. The only limitation on the expense account of the county superintendent is that it shall not exceed for the year 25% of his annual salary. This office has heretofore ruled that in calculating the annual salary for the purpose of determining the maximum expense account of the county superintendent, the total compensation of the county superintendent, including stipulated salary, his allowance as supervisor of school transportation and his allowance for preparing budgets for the school districts shall be considered as his annual salary.

Conclusion

It is, therefore, the opinion of this office that a county superintendent is entitled to amounts expended by him for meals and lodging while traveling away from his home in the performance of duties enjoined upon him by law and that where he furnishes his own transportation he is entitled to an allowance of 4¢ per mile for each

mile actually and necessarily traveled even though
a part of such travel is outside of his own county.

Yours very truly,

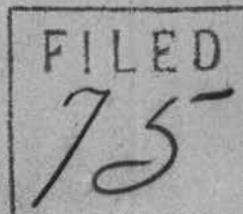
HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR, *T.B.*
Attorney General

BOARD OF : Pharmacist licensed in England entitled to license
PHARMACY : by reciprocity in this state upon showing that England
: extends reciprocity to Missouri licensees.

July 16, 1948.



Mr. Charles W. Riley, Secretary
Missouri Board of Pharmacy,
254 Wilhoit Bldg.,
Springfield, Missouri.

Dear Sir:

We have received your request for an opinion of this department concerning the eligibility of Mr. William T. Helyer, a British subject, to register as a pharmacist in the State of Missouri either by examination or by reciprocity. Your request is as follows:

"The Board of Pharmacy requests an opinion from your office as to the status of Mr. William T. Helyer as to whether this pharmacist, a British subject, is eligible to register as a pharmacist with the State of Missouri by reciprocity or by examination.

"The information you now have on your desk concerning his educational qualifications, all of which was obtained in England, is all that can be supplied at this time."

The information that you have submitted shows that Mr. Helyer completed the Junior and Senior High School courses and attended the South of England College of Pharmacy during 1923 and 1924 and was graduated therefrom. This school was recognized and approved by the Pharmaceutical Society of Great Britain and it is stated that the two-year pharmacy curriculum which it offered was probably the equivalent of the two-year curriculum offered in the United States Colleges at that time.

As for admission by examination, Section 10014 R. S. Mo. 1939, provides that applicants for license by examination shall be twenty-one years of age, shall have attended high school for four years or its equivalent, shall have had one year practical experience in a retail drug store under the supervision of a registered pharmacist, and shall be a graduate of a school or college of pharmacy whose requirements for graduation are satisfactory to and approved by the Board of Pharmacy.

You informed us that although the state of Missouri formerly approved pharmaceutical colleges which offered two-year courses, since June 1, 1937, a college has been approved only if it offers a four-year course. In view of this rule and the provisions of

Section 10014, R. S. Mo. 1939, we are of the opinion that Mr. Helyer is not eligible for admission to take the examination, inasmuch as the course which he took was two years.

As for admission by reciprocity, Section 10008, R. S. Mo. 1939, contains the following provision:

"The board of pharmacy may issue licenses to practice as pharmacists in this state without examination to such persons as have been legally registered or licensed as pharmacists in other states or foreign countries: Provided, that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this state, and that he was registered or licensed by examination in such other state or foreign country, and that the standard of competence required in such other state or foreign country is not lower than that required in this state; and also provided, that the board is satisfied that such other state or foreign country accords similar recognition to the licentiates of this state.* * "

The power which has been vested in the board to admit without examination applicants by reciprocity is but a legislative declaration of policy and its exercise lies within the discretion of the board (State ex rel. v. State Board of Health, 61 S.W. (2d) 925).

According to the information submitted to us, the board has adopted the following rule concerning license by reciprocity: "The applicant must have had the legal qualifications at the time of examination and registration in the state from which he applies which would at that time have enabled him to qualify for examination and registration."

The information which you have submitted does not indicate the date on which Mr. Helyer was licensed in England. If, however, that date was prior to June 1, 1937, when the four-year rule was adopted, he would meet the education requirement for reciprocity, inasmuch as Missouri admitted to examination persons who had completed a two-year course prior to that. However, the statute makes the further requirement that the state or foreign country from which an applicant seeks admission by reciprocity must extend like recognition to applicants from this state.

You have submitted to us a copy of the United Kingdom Medical Practitioners and Pharmacists Act of 1947. Section 11 of that Act contains the following provision:

"The power of the Council of the Pharmaceutical Society of Great Britain to make byelaws under section two of the Pharmacy Act, 1852, shall include power to make byelaws as to the registration as pharmaceutical chemists or as chemists and druggists under the Pharmacy Act, 1852, and the Pharmacy Act, 1868, of persons holding or having held a diploma as a pharmacist granted in a place outside the United Kingdom, or having passed the examinations necessary for obtaining such a diploma, providing for their registration (subject to such conditions as to character and otherwise as may be prescribed by the byelaws) either -

"(a) without examination in the United Kingdom, and without satisfying any requirements to which they would be subject apart from this section under byelaws made by virtue of paragraph (a) or (c) of section four of the Poisons and Pharmacy Act, 1908 (which relate to preliminary practical training and to periods and courses of study); or

"(b) subject to requirements as to examination in the United Kingdom, or to any such requirements as aforesaid, relaxed as compared with those to which they would be subject apart from this section."

However, no information has been submitted concerning any byelaws which have been adopted pursuant to the above-quoted section and consequently we have no way of knowing whether or not the United Kingdom now extends reciprocity to residents of this state. Until such information is supplied, we are of the opinion that the Board is not authorized to grant Mr. Helyer a license by reciprocity, but that upon receipt of information that such privilege is extended by the United Kingdom to residents of this state he should be entitled to receive a license, subject to the above-mentioned question concerning the date of his license in the United Kingdom.

CONCLUSION.

Therefore, we are of the opinion that because of the requirement that an applicant for registration as a licensed pharmacist have completed a four-year course in a pharmaceutical college that Mr. Helyer is not entitled to registra-

Mr. Charles W. Riley,

-4-

tion by examination, but that upon showing that his license was granted in England prior to June 1, 1937, and that England extends reciprocity to applicants from Missouri he is entitled to registration by reciprocity.

Respectfully submitted,

APPROVED:

ROBERT R. WELBORN
Assistant Attorney General

J. E. TAYLOR *JB*
Attorney-General

RRW/LD

ASSESSORS: County assessor in county of 4th class having a population of over 7500 according to 1940 census is entitled to 45¢ for each nonresident real estate list.

FEE:

FILED

77

June 9, 1948

6-10

Honorable Hamp Rothwell
Prosecuting Attorney
Maries County
Vienna, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"Our County Assessor, Mr. Fred Veasman, has handed me a certified copy of order, revenue form 10C, in which it is set forth that for taking non-resident real estate lists in counties of fourth class under 7500 population he is entitled only to 20¢ each for making non-resident assessment lists. The County Court wants to hold him to the 20¢ for each assessment list, when Mr. Veasman claims that he is entitled to 45¢ each for making such non-resident lists against each party, who are non-residents of Maries County. The census of 1940 (US census) give the population of Maries County at 8638. Mr. Veasman holds that the population of 1940 governs and that he is entitled to 45¢ instead of the 20¢ which the County Court wants to allow him. I would appreciate it very much indeed if you will have one of your able assistants look into this matter and let me have your opinion at the earliest possible moment."

Section 1, Laws of Missouri, 1945, page 1553, provides, in part, as follows:

"The compensation of the county assessor in counties of the fourth class having a population of 7500 or more shall be 45 cents per list, and in counties having a population of less than 7500 shall be 45 cents for each personal assessment list and resident land list and 20 cents for each nonresident real estate assessment list, * * *"

Section 654, R. S. Mo. 1939, provides as follows:

"All representation or other matters heretofore or now based on the state census shall be based on the United States census of this state."

Section 13430, Laws of Missouri, 1945, page 1550, provides as follows:

"The last previous decennial census of the United States shall be the basis for determining the population of any county in this state, for the purpose of ascertaining the salary of any county officer for any year, or the amount of fees he may retain, or the amount he shall be allowed to pay for deputies or assistants; provided that for the purposes of this section, the effective date of the 1950 decennial census of the United States shall be January 1, 1951, and the effective date of each succeeding decennial census of the United States shall be on January 1 of each tenth year after 1951."

Since there is no method provided in Section 1, Laws of Missouri, 1945, page 1553, for determining the population of such counties, the general provisions found in Sections 654 and 13430 are applicable in this case.

The population of Maries County, according to the United States decennial census for 1940, is 8638. Therefore, the Assessor of Maries County is entitled to 45¢ for each list he makes out.

Honorable Hamp Rothwell

-3-

CONCLUSION

It is the opinion of this department that the County Assessor of Maries County is entitled to 45¢ for each nonresident real estate list he makes out in such county.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General 

CBB:HR

LIBRARY STATE : 1) Purchases of supplies made without certification of Comptroller and Auditor are void and
APPROPRIATIONS: State not liable for payment. 2) Title to void purchase remains in seller and State may later purchase such supplies.

November 9, 1948



Mrs. George Rozier
President
State Library Advisory Board
Jefferson City, Missouri

11-23

Dear Mrs. Rozier:

This Department is in receipt of your request for an official opinion which reads as follows:

"Books were purchased direct by the State Librarian during the fiscal year 1947-1948, without the Purchasing Agent asking for bids, and without the Comptroller and the Auditor certifying that there was money available in the appropriation to cover such purchase. Further, the appropriation for the purchase of books for the fiscal year 1947-1948 has been entirely spent. The books have been distributed to the various bookmobiles and libraries in this State and it would be very difficult to trace and recover them. The State Library Advisory Board requests an opinion upon the following questions:

"1) Are the contracts for the purchase of the books void, or is the State liable for payment?

"2) If an answer to the first question is that the contracts are void and the State is not liable then may the Board request that the Purchasing Agent ask for bids upon used books of the same titles as the books contracted

for by the State Librarian, and if the companies who originally sold such books submit the lowest bids which would be accepted by the Purchasing Agent, may the 1948-1949 appropriation of this Board be used in payment of such used books which are purchased?"

Section 14733, Laws of Missouri, 1945, page 1132, provides for a State Library Advisory Board, and states, in part, that: "All bills of the Division properly certified, shall be paid as other bills of the state departments and divisions are paid."

Section 14736, Laws of Missouri, 1945, provides that the State Library may provide bookmobile service, and that: "All expenses of the State Librarian or assistants of the division shall be certified and paid in the same manner as other obligations incurred in the division."

A reading of the two sections, quoted above, shows that the expenses and obligations of the Missouri State Library are to be certified and paid as expenses and obligations of the other state departments are paid.

Section 64, Laws of Missouri, 1945, page 1428, provides that the purchasing agent shall purchase all supplies for all departments of the State.

Section 65 of the same law, provides that all purchases must be based on competitive bids.

Section 72, Laws of Missouri, 1945, provides, in part, as follows:

"Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this act or the rules and regulations made thereunder, such order or contract shall be void and of no effect. * * * ."

Under the provisions of the above three sections, the books in question should have been purchased by the purchasing agent upon competitive bids, and the failure to follow such procedure makes the contracts or orders in question void and of no effect.

Further, Section 60, Laws of Missouri, 1945, page 1448, states that:

"No expenditure shall be made and no obligation incurred by any department without the following certifications: (1) Certification by the comptroller pursuant to the provisions of Section 36 of this act; (2) certification by the auditor that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * * ."

It will be seen that the State Librarian in attempting to contract for books directly and without going through the purchasing agent and without obtaining the certification from the comptroller and auditor, violated the statutes of this State, and such contracts are void.

The effect of a void contract of the State or a municipal corporation is, as stated in *Central Transportation Company vs. Pullman's Palace Car Company*, 139 U.S. 24, 59, 11 S. Ct. 478, 35 L. Ed. 55, 1.c. 68:

"* * * not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The reason for this view is given by the United States Supreme Court in the case of *Thomas vs. Richmond*, 12 Wall. 349, 79 U.S. 349, 356, 20 L. Ed. 453, as follows:

"But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. * * * The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril."

In the case of *Donovan vs. Kansas City*, 175 S.W. (2d) 874, the Supreme Court of Missouri had before it a contract entered into by officers of Kansas City, which did not comply with the charter provision that all orders must carry a written certification by the Director of Finance that credit existed in the appropriation, or that a cash balance was in the treasury sufficient for payment. The Court held that this provision was mandatory, and that, absent such certification, the contract was illegal and void and not within the scope of the corporate powers of Kansas City, and further that such City incurred no liability under such contract.

Therefore, in answer to your first question it is held that the contract in question is void, and the State is not liable for the payment of the same.

In your second question you ask, if the contracts are void and the title to the books are still in the book companies, may the Missouri State Library purchase the used books from the book companies and pay for the same out of this year's appropriation.

The rule is, as stated in 17 C.J.S., page 662, that:
" * * * goods that have been delivered under an illegal agreement or for an illegal purpose may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. * * * "

Therefore, the title to the books remains in the book companies if they do not desire to hold the State Librarian personally responsible for the purchase. If the State Library Advisory Board now desires to purchase these used books and pay for the same out of this year's appropriation, we see no constitutional or statutory inhibition against the same if the statutory procedure as to certification and requisitions to the purchasing agent are followed.

It is true that Section 39 of Article III of the Constitution of Missouri, 1945, provides as follows:

"The general assembly shall not have power:

* * * * *

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; "

However, in the instant case the payment would not be of the claim made without express authority of law, to-wit: the purchase of the new books to be paid out of the 1947-1948 appropriation, but would be a payment of a claim for used books to be made out of the 1948-1949 appropriation.

CONCLUSION.

It is, therefore, the opinion of this Department that:

Purchases made direct by a department without the purchasing agent asking for bids, and without certification of the comptroller and auditor, are illegal purchases and are void, and the State is not liable for the payment of the same.

It is further the opinion of this Department that:

The title to supplies purchased by State department under a void and illegal contract does not vest in the State but remains in the seller, and the State Department may later purchase such supplies if the statutes relating to the purchasing agent and the certification by the comptroller and state auditor are followed.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

ARTHUR M. O'KEEFE
Assistant Attorney General

Copy to Mr. Smith
SHERIFFS:

MAGISTRATE COURT: Sheriff allowed fee for each day he or deputy attends magistrate court.

EMINENT DOMAINS County court can condemn land to establish
IN COUNTY COURTS: public roads.

March 15, 1948
3/16

FILED
80

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Mr. Scott:

This is in reply to your letter of recent date presenting two questions for the opinion of this department. Your letter reads as follows:

"Please advise as to whether or not the sheriff in counties like Stone, in the fourth class, is allowed and entitled to \$3.00 per day for waiting on the Circuit Court, and or the Magistrate Court. Also whether or not the deputy sheriff may collect such fee.

"Does the County Court now have jurisdiction to establish public roads and condemn lands for the right-of-way for such roads?"

This department has previously ruled that the service performed by sheriffs for attending courts of record is in the nature of a civil service and that the fees allowed for this service may be retained because they are earned in a civil matter and do not pertain to the sheriff's duties in criminal matters.

I am enclosing herewith copies of our opinions to Honorable Clyde V. Hastings, Prosecuting Attorney of Worth County, dated January 27, 1945, and Honorable Ralph B. Nevins, Prosecuting Attorney of Hickory County, dated July 1, 1946, which can be taken as authority for allowing sheriffs said fees for each day they attend a court of record which is in session. An opinion to Honorable Ralph H. Duggins, Prosecuting Attorney of Saline County, dated January 22, 1948, is also enclosed herewith holding that said fees are allowed for each deputy actually employed in attending such court and that even though said fees are allowed for the attendance of deputies they should actually be collected by the sheriff for the deputy's attendance upon such court. Since the magistrate court is a court of record, the statutes allowing sheriff's fees for attending each court of record will necessarily apply with equal force to the magistrate court.

With reference to the second question involved, the power of eminent domain is the right or power of a sovereign state to appropriate private property to particular uses for the purpose of promoting the general welfare. The power of eminent domain is inherent in sovereignty and exists in a sovereign state without any recognition of it in the Constitution. *State v. Gordon*, 36 S.W. (2d) 105. The right to exercise the power, or to authorize its exercise, is wholly legislative. It does not exist in any subordinate political subdivision unless granted by the sovereign power.

By Section 8486, R.S. Mo. 1939, the power of eminent domain in connection with the establishment of public roads is vested directly in the several counties of the state and the county court is made the agent through which the power is to be exercised. *Petet v. McClanahan*, 297 Mo. 677. Section 8486 provides, in part, as follows:

"The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads, or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, description and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. * * *"

The Legislature clearly intended to vest in the county court the power to establish and open public roads whenever and wherever necessity requires such action. *Petet v. McClanahan*, 297 Mo. 677. Whenever the county court is of the opinion that a public necessity exists for the establishment of a public road it may by an order of record so declare and then proceed in accordance with the provisions of Section 8486, and other applicable statutes, to establish such road.

Conclusion.

Therefore, it is the opinion of this department that the sheriff in counties of the fourth class is allowed \$3.00 per day for each day he or his deputies are employed in attending a court of record, said fee to be collected by the sheriff even when a deputy attends such court of record.

It is further the opinion of this department that the county court may establish public roads and through its right of eminent domain condemn private property for such purpose.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JEB*

DD:ml
Enc.

APPROPRIATIONS:
TRAINING SCHOOLS:

Appropriations for Training Schools at Boonville, Chillicothe and Tipton for payment of teachers' salaries, educational supplies, etc., should not be made out of that part of the general revenue set apart for the free public schools.

January 9, 1948

FILED

81

Mr. Louis J. Sharp, Director
Board of Training Schools
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading, in part, as follows:

"In its request for appropriations for the operations of the training schools at Boonville, Chillicothe, and Tipton, for the fiscal year beginning July 1, 1948, the Board of Training Schools plans to ask that the portion of the appropriations made to these institutions for the payment of teachers' salaries, for educational supplies and books, and for the general operation expenses of the formal educational program, exclusive of maintenance and construction of buildings, be charged to that part of the general revenue set apart for the support of free public schools.

* * * * *

The answer to the request contained in your letter makes necessary a determination of whether or not the phrase "free public schools," found in Sections 1(a) and 3(b) of Article IX of the Constitution of Missouri, includes the "educational institutions" contained in Section 38 of Article IV of the Constitution.

It is to be noted that Section 1(a) of Article IX of the present Constitution of Missouri differs from Section 1 of Article XI of the Constitution of 1875 only in requiring that the General Assembly shall establish and maintain free public schools for all persons in this state within ages not in excess

of twenty-one years, as prescribed by law, while Section 1 of Article XI of the Constitution of 1875 provided for the instruction of all persons in the state between the ages of six and twenty years; and that Section 3(b) of Article IX of the present Constitution differs from Section 7 of Article XI of the Constitution of 1875 only in the fact that the Constitution of 1875 provided for four months of schooling and the present Constitution provides for eight months.

Therefore, any interpretations placed upon the phrase "free public schools" by the courts of this state when construing the Constitution of 1875 would be considered as being adopted by the Constitution of 1945 when the same words are used. In the case of *Roach v. Board*, 77 Mo. 484, the Supreme Court of Missouri said, l. c. 488:

"The provisions of the 1st and 6th sections of article 11 of the constitution of the State, taken together, are conclusive on this point. The 1st section in effect declares that all persons in the State between the ages of six and twenty shall be gratuitously instructed in the free public schools therein provided for, and the 6th section in like manner declares that the 'public school fund,' therein mentioned, shall be faithfully appropriated for establishing and maintaining the 'free public schools' provided for in said article, and for no other uses or purposes whatsoever. The two sections, taken together, amount to both a requirement and a prohibition. By the first, free public schools for the gratuitous instruction of all persons in the State between the ages of six and twenty are required, but by the sixth, the funds thus dedicated to that use are prohibited from being expended for any other uses or purposes whatsoever. * * * * (Emphasis ours.)

Since the Supreme Court of Missouri has held that "free public schools" are those for the gratuitous instruction of all persons in the state within the required age limits, unless the training schools are open to all persons who wish to receive an education therein, they cannot be deemed to be "free public schools," and therefore the free public school fund would not be available for such institutions.

Mr. Louis J. Sharp, Director -3-

Section 8898, R. S. Mo. 1939, provides for the commitment of boys to the Missouri Training School for Boys by a court having criminal jurisdiction.

Section 9011, R. S. Mo. 1939, provides for the commitment of girls to the Industrial Home for Girls by a court or magistrate.

Section 9025, R. S. Mo. 1939, provides for the commitment of negro girls to the Industrial Home for Negro Girls by the juvenile division of the circuit court.

Since the provisions for commitment to the three training schools in Missouri can be made only by court order, it is clear that the mere fact that Section 38 of Article IV of the Constitution of Missouri denominates such institutions as "educational institutions" does not make of such institutions "free public schools," because the training that is given at such institutions is not for all children generally, but only for such children as are committed to the institutions.

Further, the fact that the Constitution of Missouri, in Article IX, the article on education, uses the same language with regard to "free public schools" as the Constitution of 1875, after such phrase had been construed by the Supreme Court of this state, is conclusive of the fact that only such institutions as were considered to be "free public schools" under the Constitution of 1875 are now "free public schools."

CONCLUSION

It is the opinion of this department that the appropriations for the payment of teachers' salaries, educational supplies and books, and for the general operation expenses of the formal educational program of the Training Schools at Boonville, Chillicothe and Tipton should not be charged to that part of the general revenue set apart for the support of "free public schools."

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CBB:HR

TRUST COMPANIES: A trust company, under the laws of this State, may not acquire or own all of the capital stock, or a controlling interest, in another trust company in this State.

FILED

81

June 7, 1948

6-8

Honorable H. G. Shaffner
Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Commissioner Shaffner:

This will acknowledge your letter requesting the opinion of this Department whether one trust company in Missouri may acquire and own all of the capital stock, or a controlling interest, in another trust company in this State.

The statute of this State in question, and the construction of which is requested in your letter is Section 9 of Senate Bill No. 245, now found in Laws of Missouri, 1945, page 924. Said Section 9 of said Senate Bill No. 245, is found on pages 929 and 930, Laws of Missouri, 1945. Said Senate Bill No. 245 is an Act repealing Section 8032, Laws of Missouri, 1943, pages 988 to 994, inclusive, relating to trust companies, and the re-enactment of a new section in lieu thereof, to be known and numbered as Section 8032. Among other acts prohibited to trust companies in said Senate Bill No. 245, are the following, as set forth in said Section 9. Said Section 9 is as follows:

"Shall not invest or keep invested in the stock of any private corporation an amount in excess of fifteen per centum of the capital and surplus fund of such trust company; nor shall it purchase or continue to hold stock of another bank or trust company if by such purchase or continued investment the total stock of such other bank or trust company owned and held by it as collateral will exceed fifteen per centum of the stock of such other bank or

trust company: Provided, however, that this limitation shall not apply to the ownership of the capital stock of a safe deposit company, the vaults of which are connected with or adjacent to an office of such trust company, nor to the ownership by such trust company or its stockholders of a part or all of the capital stock of one bank organized under the laws of the United States or of this state, nor to the ownership of a part or all of the capital of one corporation, organized under the laws of this state, for the principal purpose of receiving savings deposits or issuing debentures or loaning money on real estate or dealing in or guaranteeing the payment of real estate securities, or investing in other securities in which trust companies may invest under this chapter, nor to the continued ownership of stocks lawfully acquired prior to the first day of January, A.D. 1915."

We believe that before any trust company chartered to carry on a banking business, may purchase and hold the stock of another trust company doing a banking business or purchase the stock of a bank, it must have statutory authority so to do, including the percentage or the amount of such stock in another corporation which it may acquire. 7 C.J. 888 on the power and authority of a trust company to purchase stock in another corporation, states the following text:

"A loan, trust, or investment company has been held to be without lawful power to purchase its own stock or to purchase a controlling interest in the stock of another bank for the purpose of operating and managing such bank. * * *".

Footnote 7, to the above quoted text from Corpus Juris, cites the case of State vs. Bankers' Trust Company, 157 Mo. App. 557, 138 S.W. 669. That was a case decided by the Kansas City Court of Appeals, construing a statute

relating to trust companies prior to the time trust companies were given authority to carry on a commercial banking business. However, the principles discussed and announced by the Court are applicable to present statutes and present general conditions in like manner as they were then applied to the case there under discussion. The Court in stating what the powers of trust companies are, l.c. 564, in said case, said:

"* * * 'the enumeration of the powers conferred upon trust companies by the statute must be held to exclude all others.' * * *".

Section 9 of said Senate Bill No. 245, hereinabove quoted, in the proviso thereof, is explicit and definite in providing that the limitations of said Section shall not apply "* * * to the ownership by such trust company or its stockholders of a part or all of the capital stock of one bank organized under the laws of the United States or of this state * * *". The proviso does not include the stock of "trust companies" as being subject of purchase in excess of the 15% thereof, permitted to be purchased as named in the first part of said Section 9. The proviso confines the privilege of purchasing all of the stock of a corporation by a trust company to that of "banks". It is then reasonable, we think, to conclude that the Legislature confined the power of a trust company in purchasing the whole of the stock of another corporation to one bank and thereby by implication withheld the power of a trust company to purchase the whole of the stock of another trust company to prevent the creation of a monopoly.

Turning again to the Bankers' Trust Company case, supra, on the question of it being the public policy of this State to prohibit one trust company from purchasing and owning the whole of the stock of another trust company to prevent monopolistic practices, the Court, l.c. 569, 570, further said:

"The purchase of the stock of the Kansas bank by the Bankers Trust Company for the purpose of controlling the management of the bank was void for the reason that not

only was it in excess of the corporate powers of the Trust Company but was violative of the sound rule of public policy which forbids the creation of monopolies through the ownership by one corporation of controlling interests in the stock of others."

The terms of the proviso of said Section 9 of Senate Bill No. 245, Laws of Missouri, 1945, l.c. 929, providing that a trust company may only purchase the total stock of one bank, and failing to include the right to purchase the stock of a trust company, is plain and certain, so that we believe no room exists for construction of said proviso. It mentions one bank but does not mention a trust company. Our Supreme Court on the question that a plain, unambiguous statute needs no construction, in the case of State ex rel. Thompson, 319 Mo. 492, l.c. 496, said:

"* * * Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' * * *".

Should there be need, however, of the citation of authority to aid in the construction of said proviso, we believe that the rule as stated by 59 C.J. 984, Section 582, is applicable here, where it states the following:

"* * * where a statute enumerates the things upon which it is to operate, or forbids certain things, it is to be construed as excluding from its effect all those not expressly mentioned; * * *".

See: State ex Inf. Conkling ex rel. Hendricks vs. Sweaney, 195 S.W. 714, 270 Mo. 685.

CONCLUSION.

It is, therefore, the opinion of this Department that, under the terms of Section 9 of Senate Bill No. 245, Laws of Missouri, 1945, l.c. 929, 930, a trust company organized under the Laws of Missouri, may not acquire or own

Honorable H. G. Shaffner

-5-

all of the capital stock, or a controlling interest, in another trust company in Missouri.

Respectfully submitted,

GEORGE W. CROWLEY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

GWC:ir

UNCLAIMED : The Commissioner of the Division of Finance in
BANK DEPOSITS: Missouri may not lawfully pay to one creditor
: or depositor unclaimed deposits remaining in his
: custody upon the liquidation of a bank or trust
: company to the exclusion of other creditors or de-
: positors having claims against such fund. The Com-
: missioner must, under Section 7898, R.S.Mo. 1939,
: after such unclaimed deposits have been held by him
June 14, 1948 for a period of more than six
years pay the same to the
Escheat Fund of the State.

6-15
Honorable Harry G. Shaffner
Commissioner
Division of Finance
Department of Business and Administration
Jefferson City, Missouri

FILED

81

Dear Commissioner Shaffner:

This will refer to your letter of recent date requesting an opinion from this Department on the question of whether you shall deliver to the Reconstruction Finance Corporation unclaimed deposits amounting to \$1,433.92 remaining in your custody upon the liquidation of the Bartlett Trust Company of St. Joseph, Missouri, on account of the fact that the R.F.C. loaned the Bartlett Trust Company sums of money during the liquidation to pay depositors, all of which sums were not repaid to the R.F.C., upon its claim that it is a creditor of said defunct Trust Company, and is entitled to all of said sum, or whether you shall, under the terms of Section 7898, R.S. Mo. 1939, deliver said sum to the State Treasurer of the State of Missouri to be deposited in the Escheat Fund of this State.

Your letter is as follows:

"You will note by the attached copies of letters received from the Reconstruction Finance Corporation that Mr. Rufus Burrus, Agency Counsel, requests payment be made to that agency of the \$1,433.92 representing proceeds of a loan made by the Reconstruction Finance Corporation to the Bartlett Trust Company to pay off deposits, but which depositors have not claimed their deposits."

"In my letter of April 21 I advised that I knew of no authority which would permit the payment to the Corporation the amount claimed, since it represented unclaimed dividends now to be escheated to the State of Missouri.

"May I be favored with your official opinion?"

The correspondence between your Department and counsel for the Reconstruction Finance Corporation in regard to this question has been inspected and carefully read. We note that R.F.C. through its counsel vigorously asserts its right to these unclaimed deposits in the sum above stated, on the grounds that the depositors who may be entitled to their respective interests in said sum of money still fail to claim their deposits, and that the R.F.C. is entitled to the whole thereof, as a known creditor and claimant, as against all of the remaining depositors or creditors whose separate respective deposits are represented by said fund. Counsel for the R.F.C. cite as an authority sustaining its position, the case of Reconstruction Finance Corporation vs. Brady, State Banking Commissioner, et al. (Texas), 150 S.W. (2d) 357. Counsel for the R.F.C. in the third paragraph of their letter to your Department dated April 22, 1948, make the following statement:

"It is our belief that this corporation is exactly in the same position that the Reconstruction Finance Corporation was in the Texas case, and that the same law applies to our situation as applied there."

The Texas case cited here has been read and considered. We believe it is not applicable here on account of our Sections, 7897 and 7898, R.S. Mo. 1939.

Section 7897, R.S. Mo. 1939, provides for the creation and maintenance of a trusteeship for sums remaining due to and unclaimed by a creditor, a depositor, or other persons named, upon the liquidation of a bank. But our sections do not stop with that. The next succeeding section of our statutes, Section 7898, in the second proviso thereof,

states the following:

"* * * and provided further, that after said sum or sums of money belonging to any unlocated depositor, creditor, stockholder or shareholder has remained with the Commissioner for a period of more than six years, said sum or sums of money shall be paid into the escheat fund of the State of Missouri: * * *".

The question considered here is not an equitable matter. It is governed exclusively by Section 7898, R.S. Mo. 1939, as a matter of law. The escheat provision contained in the second proviso of said Section 7898, is mandatory upon your Department, with the provision: "* * * that after said sum or sums of money belonging to any unlocated depositor, creditor, stockholder or shareholder has remained with the Commissioner for a period of more than six years, said sum or sums of money shall be paid into the escheat fund of the State of Missouri."

This provision, then, being mandatory, rather than directory, demands a strict construction of its terms to compel compliance with, and the administration of, the statute as written. 59 O.J., page 984, Section 582, on this question, states the following rule, respecting the construction of such a statute, to-wit:

"* * * and where it directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person. * * *".

This rule has been recognized and is upheld by our Supreme Court in numerous cases, one of which is the case of State ex rel. vs. Holtcamp, 322 Mo. 258, where our Supreme Court, l.c. 268, said:

"'Whenever a statute limits a thing to be done in a particular form, it necessarily includes in itself a negative, namely, that the thing shall not be done otherwise.' * * *".

Our Banking Code directs the liquidation of insolvent banks or trust companies without giving any preference whatever to any depositor or creditor in the distribution of unclaimed deposits on hand at the final liquidation of such institution. All are treated alike by the statute, and anyone of the aggregate number of depositors or creditors is entitled at any time, and at all times, fixed by statute, to apply for and receive his or her respective unclaimed deposits.

The Reconstruction Finance Corporation, in the matter here being considered, has been neither defrauded nor prejudiced. It stands exactly, by the terms of said Section 7898, upon the same ground of any other creditor. It has no priority or preference under the statute over any other creditor or depositor, and surely it cannot be said that the courts may confiscate the deposits due other creditors and depositors, and hand them over to one claimant.

CONCLUSION.

It is, therefore, the opinion of this Department that:

1) Considering the above authorities, the Reconstruction Finance Corporation, as a creditor, is not entitled to claim or receive the sum mentioned in your letter representing unclaimed deposits now held in the custody of your Department, and derived from the liquidation of the Bartlett Trust Company, to the exclusion of other creditors, or the owners of unclaimed deposits included in said sum.

2) It is the further opinion of this Department that, under the terms of Section 7898, R.S. Mo. 1939, it is mandatory that you pay, at the time provided by law, such funds to the State Treasurer of the State of Missouri, to be deposited and held in the Escheat Fund of the State of Missouri, until otherwise disposed of according to law.

Respectfully submitted,

APPROVED:

GEORGE W. CROWLEY
Assistant Attorney General

J. E. TAYLOR
Attorney General

GWC:ir

LOTTERIES: Theater scheme whereby contestant identifies local resident by clues is a lottery.

August 20, 1948

FILED

81

8-24
Mr. Sam E. Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri

Dear Sir:

This department is in receipt of your request for an official opinion which reads as follows:

"I would like to obtain an opinion as to whether or not the following described scheme is a lottery.

"One of the theaters here in Moberly has asked me about this as they would like to put it into effect. The plan is known as a 'Know Your Neighbor' contest. Inclosed is some literature on the subject. As I understand the plan, a biography is prepared of some prominent person and certain clues are also prepared. Then on one night each week a member of the audience is called to the stage and given the first clue. If he guesses the person he is given a cash prize. If he does not guess the person the thing is continued until the following week when the original clue plus an additional clue is given to some other person selected by lot from the audience. If that person does not guess it the thing is carried over and an additional sum is added each week until some person guesses the identity of the individual.

"They informed me that they will select the contestant each week by having a map on the stage of all of the seats in the theater and by calling someone to the stage and selecting some seat in the audience and thus choosing by that method the person who will have the chance to guess at the clue. The whole scheme works kind of like the radio

walking man contest, or the Dr. I. Q. contest. The theater manager informs me that on the nights the contest is held that every 10th person will be admitted to the theater free."

Section 39, Article III, of the Constitution of Missouri, 1945, provides, in part, as follows:

"The General Assembly shall not have power:

* * * *

"(9) To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery;"

Section 4704, R. S. Mo. 1939, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

It is well-settled in this state that the elements of a lottery are (1) consideration; (2) prize; (3) chance. State v. Emerson, 318 Mo. 633, 1 S.W.(2d) 109; State ex inf. McKittrick v. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W.(2d) 705. The fact that there is a prize present in the scheme described in your letter cannot be doubted

As to the element of consideration, the purchase of a ticket of admission to the theater is sufficient to constitute consideration. State v. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098; 54 C.J.S. 854. The fact that every tenth person is admitted to the theater free does not in any way eliminate the element of consideration from the scheme. It has been well settled in this state since the case of State vs. McEwan, 343 Mo. 213, 120 S.W.(2d) 1098, which is the so-called "bank night" case, that a scheme is still a lottery even if certain free admission tickets are given. As the court, en banc, said through Commissioner Westhues: (l.c. 1101)

"So the scheme described in the information has, in actual practice, all the elements of a lottery, and is just as harmful as if it were limited to those purchasing tickets. See Commonwealth v. Wall (Mass.) 3 N.E. 2d 28, loc. cit. 30, where the court said:

"On the other hand, a game does not cease to be a lottery because some, or even many, of the players are admitted to play free, so long as others continue to pay for their chances. Glover v. Malloska, 238 Mich. 216, 219, 213 N.W. 107, 52 A.L.R. 77; State v. Eames (87 N.H. 477) 183 A. 590, 592. So here the test is not whether it was possible to win without paying for admission to the theatre. The test is whether that group who did pay for admission were paying in part for the chance of a prize. The jury could disregard all evidence introduced by the defendant favorable to him. They could take a realistic view of the situation. They were not obliged to believe that all the ingenious devices designed to legalize this particular game of chance were fully effective in practical operation * * *"

The question next presents itself as to whether the element of chance is present in the scheme described in your request. As stated, a person is chosen from the audience who in turn designates a seat on a map of the theater. The person sitting in the seat designated is then given the first clue as to the identity of a resident of the town. If the person is unable to identify the resident from the clue then the contest goes over to next week at which time another person is selected in the same manner and the original clue plus an additional clue as to the identity is given. This procedure is followed each week until the resident is identified.

Judge Ellison in State ex Inf. McKittrick v. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W.(2d) 705, discusses extensively the question as to what constitutes chance in a lottery and this case is perhaps the leading case in the United States upon this question. He points out the rule in the United States and in Missouri which is that chance need be only the dominant factor and thereby adopting the 'dominant chance' rule as opposed to the 'pure chance doctrine' which prevails in England and Canada. This dominant chance rule is explained at l.c. 717 as follows:

"* * *But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. * * *"

In applying the above rule to the scheme in question it will be seen that the person selected to identify the resident is selected by some person from the audience arbitrarily designating a seat in the theater. It is apparent that the right of the person to participate in the first instance is dependent entirely upon chance, that is, that his seat would be selected. Furthermore, after a person has been selected then he is only given one clue as to the identity of the resident under which circumstances it is obvious that the identification would be so difficult as to be entirely a matter of chance. As other clues are given in succeeding weeks the identity becomes more apparent. What was said in the Globe Democrat case, supra, is equally applicable to the present situation although in that case the process was reversed, that is, that the first questions were comparatively simple but towards the end of the contest the answers became so difficult as to render a correct answer one entirely reached by chance. The court said, l.c. 717:

"* * *In the instant case it stands conceded that at the beginning of the 'Famous Names' contest the cartoons were comparatively simple and the list of suggested titles was short. This made the contest inviting to entrants. But toward the end the cartoons became more 'subtle' and as many as 180 titles had to

be considered. It was a weeding out process, undoubtedly; and, if chance inhered in the solution of these latter cartoons, though only a few of them, and eliminated a large number of contestants, then it must be said the result was influenced by chance."

In view of the above, we believe it is apparent that the element of chance is present in the scheme described.

CONCLUSION

It is, therefore, the opinion of this department that a scheme whereby a person attending a theater is selected by lot from the audience and is given a clue which would identify a resident of the town and if the person is not identified then the next week another person is selected by lot and the original clue and an additional clue is given as to the identity of the resident, and such procedure is followed until the resident is identified and a prize is given to the person making the identification is a scheme in the nature of a lottery and violates the constitution and statutes of this state.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

AMO'K:mw

LOTTERIES: Merchandising scheme with prize award by lot and quiz question is a lottery.

August 23, 1948



8.24

Honorable Samuel E. Semple
Prosecuting Attorney
Moberly, Missouri

Dear Mr. Semple:

This department is in receipt of your request for an official opinion which reads as follows:

"I would like to ask your opinion on another give away scheme at a theater here in Moberly. Certain merchants in the town are sponsoring the give away at the theater and will give out tickets with merchandise purchased. These tickets are placed in a box in the theater from which are drawn tickets, and the holder of the ticket is called to the stage and asked a quiz question. If the answer is correct that person is given a prize such a radio or other merchandise.

"Would your office consider such a scheme a lottery?"

Section 39, Article III of the Constitution of Missouri, 1945, provides, in part, as follows:

"The General Assembly shall not have power:

"(9) To authorize lotteries or gift enterprises for any purpose, and shall enact laws to prohibit the sale of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery; "

Section 4704, R. S. Mo. 1939, provides as follows:

"If any person shall make or establish, or aid or assist in making or establishing, any lottery, gift enterprise, policy or scheme of drawing in the nature of a lottery as a business or avocation in this state, or shall advertise or make public, or cause to be advertised or made public, by means of any newspaper, pamphlet, circular, or other written or printed notice thereof, printed or circulated in this state, any such lottery, gift enterprise, policy or scheme or drawing in the nature of a lottery, whether the same is being or is to be conducted, held or drawn within or without this state, he shall be deemed guilty of a felony, and, upon conviction, shall be punished by imprisonment in the penitentiary for not less than two nor more than five years, or by imprisonment in the county jail or workhouse for not less than six nor more than twelve months."

A lottery in this state consists of three elements: prize; consideration and chance. State vs. Emerson, 318 Mo. 633, 1 S.W. (2d) 109; State ex inf. McKittrick vs. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W. (2d) 705.

The fact that the person is given a radio, or other merchandise, constitutes the element of prize.

It is the rule in this state, and in other jurisdictions, that a ticket or chance given with each purchase of merchandise constitutes consideration within the meaning of the lottery law. State vs. Emerson, 318 Mo. 633, 1 S.W. (2d) 109; Featherstone vs. Independent Service Station Association (Tex. Civ. App.) 10 S.W. (2d) 124; Retail Section of Chamber of Commerce vs. Kieck, 128 Neb. 13, 257 N.W. 493; People vs. Bloom, 227 N.Y. 225 (reversed on other grounds) 248 N.Y. 582, 162 N.E. 533; Market Plumbing and Heating Supply Co. vs. Spangenberg, 112 N.J.L. 46, 169 A. 660. Furthermore, it appears from your request that a person to be eligible to receive the prize must be in attendance at the theater, and the purchase of an admission ticket to the theater under such circumstances has been held to constitute consideration. State vs. McEwan, 343 Mo. 213, 120 S.W. (2d) 1098, In order for the person to win a prize his ticket must have been selected from a box which contains all the tickets.

This is obviously a selection by chance. The fact that, in order to win the prize a quiz question must be answered correctly, does not, in any way, carry away the inherent evil in the scheme. The answering of the question is merely an incidental element as compared to the selection of a ticket from the box which contains the names of all the ticket holders. As Judge Ellison said in the case of State ex inf. McKittrick vs. Globe Democrat Pub. Co., 341 Mo. 862, 110 S.W. (2d) 705, 1.c. 717:

"* * * But we draw the conclusion from them that where a contest is multiple or serial, and requires the solution of a number of problems to win the prize, the fact that skill alone will bring contestants to a correct solution of a greater part of the problems does not make the contest any the less a lottery if chance enters into the solution of another lesser part of the problems and thereby proximately influences the final result. * * * ."

In view of what has been said, it will be seen that the three elements: prize; consideration and chance, are present in the scheme described in your request, and that such scheme constitutes a lottery, in violation of the Constitution and laws of this State.

CONCLUSION.

It is, therefore, the opinion of this department that a scheme whereby the merchants of a town give away tickets for merchandise purchased from the merchants, which tickets are placed in a box in the theater from which are drawn tickets, and the holder is called to the stage and asked a quiz question, which question if answered correctly entitles the person to a prize, is a scheme in the nature of a lottery, and is illegal in Missouri.

Respectfully submitted,

APPROVED:

ARTHUR M. O'KEEFE
Assistant Attorney General

J. E. TAYLOR
Attorney General

AMO'K:ir

ELECTIONS: Cross mark must be placed in square at the left of "write-in" candidate's name.

October 21, 1948

Honorable Samuel Semple
Prosecuting Attorney
Randolph County
Moberly, Missouri



Dear Mr. Semple:

This Department is in receipt of your request for an official opinion which reads as follows:

Would you please give me an official opinion on the following questions:

- 1) May a voter write-in the name of any person he chooses for any office when there is no nominee for that office elected at the primary election?
- 2) If the answer to the above question is yes, then is the mere writing in of the name sufficient, or must a cross mark be placed in the square to the left of the name?

Section 11603, R. S. Mo. 1939, provides, in part, as follows:

"* * * If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such cancelled name the name of the person for whom he desires to vote, and placing a cross mark in the square at the left of such name. * * *."

Honorable Samuel Semple

-2-

In answer to your first question, this Department on September 28, 1948, to Honorable Emory L. Melton, Prosecuting Attorney, Barry County, Cassville, Missouri, held as follows:

"We are of the opinion that at a general election a voter may 'write in' the name of any person he chooses for any office he chooses without regard to whether or not there is a regular party nominee. Further, that, under our system of elections, the person receiving the majority vote for any particular office is the person elected to said office."

A copy of this opinion is enclosed.

In answer to your second question, it will be noted that Section 11603, supra, is plain in its requirement that a person writing in the name of a candidate must place a "cross mark in the square at the left of such name." Therefore, a voter who writes in the name of a person for an office for which no candidate was nominated at the primary election, must not only "write-in" the name of the person, but must also place a cross mark in the square at the left of the name.

CONCLUSION.

It is, therefore, the opinion of this Department that: a voter may "write-in" the name of a person he chooses for any office, regardless of whether or not there is a party nominee.

It is further the opinion of this Department that: a cross mark must be placed in the square at the left of such name written in, even though a cross mark has been placed at the top of the ballot.

Respectfully submitted

ARTHUR M. O'KEEFE
Assistant Attorney General

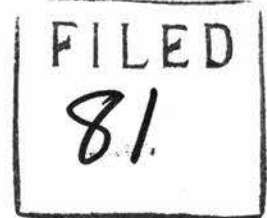
APPROVED:

J. E. TAYLOR
Attorney General

CREDIT UNIONS:

There is no statutory authority in Missouri permitting the changing of a state credit union to a federal credit union.

November 10, 1948



Honorable Harry G. Shaffner
Commissioner of Finance
Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Shaffner:

This will be in response to your letter of recent date, concerning the authority of a credit union incorporated under the statutes of Missouri to change its organization and identity from a state credit union to a federal credit union. Your letter is as follows:

"A credit union chartered under Missouri Law wishes to change from a state to federal charter. The federal department in this connection requests the approval of the Commissioner to the effect that the proposed transfer of assets and liabilities from state to federal charter is not in conflict and may be effected under the laws of the State of Missouri and particularly under the provisions of Section 5540 of Missouri Statutes.

"This Division contends that it can only recognize the dissolution of a state chartered credit union and the problem of whether or not the shareholder is paid in cash or reverts his shares into another credit union is within the holder's rights.

"May we be advised with an opinion?"

Your letter refers especially to Section 5540, R.S.Mo. 1939, Laws, Missouri, 1945, page 722, respecting the proceedings looking toward the dissolution of a credit union organized and incorporated under the statutes of this State and the effect of the proceeding to dissolve such a corporation.

Honorable Harry G. Shaffner

Your immediate query is: whether our statutes provide for the change from a state credit union to a federal credit union.

Said Section 5540, R.S.Mo. 1939, Laws of Missouri, 1945, page 722, providing for the dissolution of a credit union has no provision whatsoever authorizing a credit union organized under the terms of Article 5, Chapter 38, R.S.Mo. 1939, and amendments thereto, to change in anywise from a state credit union to a federal credit union, either by consolidation or merger, or by any other process.

Said Section 5540 as amended, Laws of Missouri, 1945, page 722, provides only for the dissolution and final winding up of the affairs of a credit union in this State by following the terms of that section of our statutes. The section provides that upon the filing of a notice of the purpose to dissolve a credit union with the Commissioner of Securities in this State, such credit union shall continue in existence only for the purpose of discharging its debts and obligations, collecting and distributing its assets and doing all other acts required in order to wind up its business affairs. There is no authority whatsoever, in said Article 15, Chapter 33, and amendments thereto, for such a credit union to change its identity and organized existence into a federal credit union.

In considering this question we have examined and here refer to Chapter 14, Title 12, U.S.C.A., page 600, etc., on the subject of Federal Credit Unions, to learn if there is any authority or direction in the federal statutes on the subject permitting or inviting the changing of a state credit union into a federal credit union. The federal statutes in said Chapter 14 of said Title 12 of the federal statutes, from Section 1751 to and including Section 1771, covering the whole federal scheme and plan of the organization and supervision of federal credit unions, makes no mention whatsoever of the amalgamation, consolidation, merging or changing of a state credit union into a federal credit union.

This being the condition of the state laws and the federal laws respecting credit unions, and none of which statutes provide for such change of a state credit union to a federal credit union, we believe it is conclusive that your position, holding that your Department has no authority to authorize or approve any proceeding which undertakes to change a state credit union into a federal credit union organization is correct. As we read the statutes, your duty, under said Section 5540, is only to approve the dissolution of a state credit union. Our Supreme Court has

Honorable Harry G. Shaffner

defined the extent of the authority of the Commissioner of Finance, with respect to the performance of his official duties. In the case of State ex rel. Banister et al. vs. Cantley, Commissioner of Finance, et al., 52 S.W. (2d) 397, 1.c. 398, respecting the statutory powers of the Commissioner of Finance of this State our Supreme Court said:

"The functions of the finance commissioner, like any other official, are limited to the powers and duties imposed upon him by the statute which creates the office. 46 C.J. 1031; State ex rel. Bradshaw v. Hackmann, 276 Mo. 600, 208 S.W. 445; Lamar Township v. City of Lamar, 261 Mo. loc. cit. 189, 169 S.W. 12, Ann. Cas. 1916D, 740.

"An official such as the finance commissioner has no implied powers except such as are necessary to the effective discharge of the powers expressly conferred. 46 C.J. 1032."

It seems that the writer of the letter to you requesting your approval of a plan to change a state credit union into a federal credit union, and the transfer of the assets and liabilities of the state credit union to a federal credit union, believed that the office of the Attorney General of Missouri could give an opinion in approval of your consent for such change from a state credit union to a federal credit union if the same were attempted.

We find no authority whatsoever in the statutes of this State, including those hereinabove mentioned, nor the federal statutes also hereinabove mentioned, giving the Attorney General of Missouri any such authority.

CONCLUSION

It is, therefore, the opinion of this Department that there is no statutory authority in Article 15, Chapter 33, R.S.Mo. 1939, and amendments thereto, or in Chapter 14, Title 12, U.S.C.A., permitting your Department or this Department to approve the changing of a credit union, organized and incorporated under the laws of the State of Missouri, to a federal credit union.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

Phillips
COUNTY-LIBRARY: Election to establish County Library System to be held at annual school meeting and conducted as election for county superintendent of schools.

FILED

83

March 19, 1948

3-30

Mr. John W. Smith
Prosecuting Attorney
Washington County
Potosi, Missouri

Dear Sir:

This will acknowledge receipt of your letter of February 27, 1948, in which you request an opinion of this Department. This letter, omitting caption and signature is as follows:

"The County of Washington is going to vote on a tax levy for a County wide library, and, of course, the proposition of establishing a county wide free library.

Sections 14767 and following sections of Article VI of Chapter 110 deal with this subject.

It appears to me from Section 14767 of this said article that the voting will be done at the annual school election on the first Tuesday in April.

Some questions arise as follows: (1) Will the votes be taken and recorded by the officials that take and record the votes on matters that have heretofore been voted on at such elections; (2) if so, does the County Court have to do anything toward naming the officials who take and record said votes; (3) what certifications are made, if any, by those taking and recording said votes to the County Court; (4) what is done with the ballots that are cast on these propositions, are they placed in a sealed envelope and certification made by the proper authority and returned to the County Court for canvassing; (5) what supplies, if any should the County Court furnish school districts voting on these propositions; (6) what instructions, if any, should the County Court give those taking and recording said votes in the various districts?

We shall appreciate very much your assistance in this matter."

It will be noted that this opinion request contains six different questions concerning an election for the establishment of a County Library to be answered by this Department and we will discuss these questions in the order in which they are set out in your request, supra.

The first question to be considered is, "Will the votes be taken and recorded by the officials that take and record the votes on matters that have heretofore been voted on at such elections?" The first statute which we must consider is Section 14767, Mo. R.S.A., which, in part, provides the following:

"Whenever one hundred (100) taxpaying citizens of any county, outside of the territory of all cities and towns now or hereafter maintaining, at least in part by taxation, a public library, shall in writing petition the county court, asking that a county library district of the county, outside of the territory of all such aforesaid cities and towns, be established and be known as '_____ county library district,' and asking that an annual tax be levied for the purpose herein specified, and shall specify in their petition a rate of taxation not to exceed two mills on the dollar; then the county court shall, if it finds said petition was signed by the requisite number of qualified petitioners, enter of record a brief recital of such petition, including a description of such proposed county library district, and of its finding aforesaid; and shall order that the propositions of such petition be submitted to the voters of such proposed district at the next annual election to be held at the first Tuesday in April; and that the clerk of the County Court shall cause to be published the proposition or propositions of such petition; and said county clerk shall cause said proposition or propositions to be published in like manner, as near as may be, with the publication of 'the nominations to office,' as provided in Section 11542, R.S. 1939. * * *"

The above statute, as stated in your letter, sets the time for such election to be on the date of the annual election to be held on the first Tuesday in April. This reference to the "next annual election" apparently refers to the annual school meeting which is held on that date under the provisions of Section 10418, R.S. Mo. 1939

The provisions of Article 6, Chapter 110 of the Mo. R.S.A., refer to County Library Districts, and since there is no provision made therein for the selection of election judges or officials, we must then look to the intention of the Legislature in failing to enact any such provision. It seems reasonable to suppose that if special judges or officials were wanted by the Legislature for an election on the County Library Systems, it would have made provision for their appointment or election. However, such provision was not made, but the Legislature did provide that the election was to be held at the annual school meeting which would indicate that the Legislature intended to use whatever election machinery was available at such meeting.

It is well settled in Missouri that where a statute provides for an election but makes no specific provision for the mode of conducting such election it will be governed by the law for the conducting of other elections in the district or subdivision. In *State ex rel. Miller v. M.K. & T. Ry. Co.*, 164 Mo. 208, the court said at page 213:

" * * * The power being conferred to hold an election and no means provided therefor, carries with it as an inevitable and indubitable incident the usual and customary means to put into effect the power thus conferred. * * *"

In the cases of *State ex rel. Clark County v. Hackmann*, 280 Mo. 686, 218 S.W. 318, and *State ex rel. Gilpin v. Smith*, 339 Mo. 194, 96 S.W. (2d) 40, elections were held sufficient where the ordinary and usual machinery provided for obtaining the expression of the voters upon the question was used.

Therefore, we must look to the statutes to determine if the Legislature has provided a method of holding an election upon a question similar to the one under consideration. Every four years a county superintendent of schools is elected at the annual school meeting (Section 10609, Mo. R.S.A.). The election in which the propositions to establish a County Library District and provide a tax therefor are submitted is substantially a county election. We believe that the procedure for the conduct of the election to elect the county superintendent of schools is analogous and should be followed in such election.

Provision is made for the election officials in the election to elect a county superintendent of schools under the provisions of Section 10610, Mo. R.S.A., which, in part, provides the following:

"The voting for county superintendent shall be by ballot and all ballots cast shall be counted for the persons for whom cast, and it is hereby made the duty of the members of the board of directors and the chairman and secretary of the annual school meeting to see that each ballot so cast is counted for the person receiving the same, and it is hereby made the duty of the chairman of the annual school meeting, within two days after such meeting, to transmit the tally sheets and all ballots, in person or by registered letter, to the clerk of the county court; such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated."

In view of the above provisions of the statute and of the failure of the Legislature to provide for the election or appointment of judges for an election relative to the establishment of a County Library System, we believe that the votes on the establishment of such a system will be taken and recorded by the officials designated by the statutes to preside at the election of the county superintendent of schools.

Your second question is, "Does the County Court have to do anything toward naming the officials who take and record said votes?" Under the statutes pertaining thereto the county court has no power over the selection of the officials, but said officials are provided for in Section 10610, supra, and the votes are counted by the board of directors, the chairman and secretary of the annual school meeting who are the only officials named by the statutes.

Your third question is, "What certifications are made, if any, by those taking and recording said votes to the County Court?" Section 10610, supra, provides for the returns of the election of the county superintendent of schools, and such provision will govern as to the returns of the election for the establishment of a County Library System. This provision is, in part, as follows:

" * * * At least ten days before the annual school meeting in any year when a county superintendent of public schools is to be elected, the county clerk shall cause to be printed ballots with the names of the candidates who have filed declarations of their candidacy printed thereon in alphabetical order, said ballots to be substantially in the following form: * * * The clerk of the

county court shall cause to be delivered to the president or clerk of the board of school directors of the various districts of the county a sufficient number of ballots for the voters of the district and a tally sheet of sufficient size to contain the names of all the qualified voters of such districts, which tally sheets shall so far as practical conform to the form of poll book set out in Section 11490 of Article 2, Chapter 76, Revised Statutes of Missouri, 1939, relating to general elections; and in making the returns of such election, the tally sheets shall be certified by the chairman and secretary of such annual school meeting and attested by the members of the board of directors of the district, who may be present. * * *

The fourth question is, "What is done with the ballots that are cast on these propositions, are they placed in a sealed envelope and certification made by the proper authority and returned to the County Court for canvassing?" Again, following the same reasoning as we did in answering the first question set out in your letter, we find that Article 6, Chapter 110, dealing with County Library Districts, does not provide for the disposition of the ballots after the election other than they will be certified to by the county court. Consequently, we feel that we should go to the other laws governing the election of county superintendent, and cite the following passage from Section 10610, supra:

"such ballots to be in a sealed package, separate and apart from such tally sheets, such package being properly designated."

Your fifth question is, "What supplies, if any, should the County Court furnish school districts voting on these propositions?" Such an election is of county-wide interest and is ordered by the county court after certain preliminary steps are completed. We feel that there can be no doubt that this is a county election, as much so as one held for the election of the county superintendent of schools. Consequently, there being no specific statute on this question, it should follow that the county court, through the county clerk, must furnish the same supplies for this type of election as for an election for the county superintendent of schools, as provided by that portion of Section 10610 previously quoted.

The sixth and last question in your request inquires as to "what instruction, if any, should the County Court give those taking and recording said votes in the various districts?" The statutes

do not provide for any instructions, as such, to be given the judges or election officials by the county court. However, Section 10610, supra, prescribing the duties of the election officials, must be followed.

Conclusion.

It is therefore the opinion of this department that:

(1) The persons conducting the elections at the annual school meeting shall be the election officials for the election to establish a County Library System.

(2) The county court has no authority to appoint judges for such election.

(3) The certification as to the result of the election is made by the chairman and secretary of the school board and the members of the board that are present.

(4) All ballots are delivered to the clerk of the county court by the chairman of the annual school meeting after having been placed in a sealed package separated from the tally sheets.

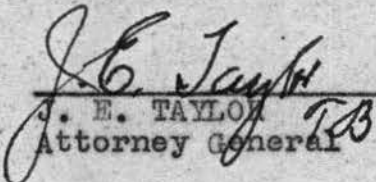
(5) The same supplies should be furnished by the county court, through the county clerk, as are furnished for the election for county superintendent of schools.

(6) There being no specific instructions to be given to those taking and recording the votes, Section 10610, Mo. R.S.A., prescribing the duties of such election officials, must be followed.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney General

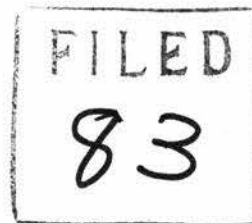
APPROVED:


J. E. TAYLOR
Attorney General

ELECTIONS:
RESIDENCE:

Persons residing on government lands ceded by
the state are not residents for the purpose
of voting.

June 9, 1948



Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Mr. Slankard:

This is in reply to your request for an opinion, which we
will restate for the purpose of brevity, and which is essentially
as follows:

Are the persons at present residing on land
comprising Camp Crowder, located in Newton
County, residents of Missouri for voting
purposes?

At the outset, it would be well to state that this opinion
will be limited to the residence qualifications only of the
above-named persons and is not concerned with any of the other
qualifications for voting as required by the Constitution and
statutes, nor is there any attempt to go into the matter of
intention as these are individual matters and could only be
applied to the individual cases.

Article VIII, Section 2 of the Constitution Missouri adopted
in 1945, provides as follows:

"All citizens of the United States, including
occupants of soldiers' and sailors' homes,
over the age of twenty-one who have resided
in this state one year, and in the county,
city or town sixty days next preceding the
election at which they offer to vote, and no
other person, shall be entitled to vote at
all elections by the people; provided, no
idiot, no insane person and no person while
kept in any poorhouse at public expense or
while confined in any public prison shall be
entitled to vote, and persons convicted of

Honorable Wayne V. Slankard

felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting." (Underscoring ours.)

Section 11469, Mo. R. S. A., 1939, provides, in part, as follows:

"All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people: Provided, each voter shall vote only in the township in which he resides, * * *"

In 1943 the 62nd General Assembly passed House Bill No. 397 (found in Laws of Missouri, 1943, page 627), Sections 12691.1 and 12691.2, Mo. R. S. A., 1939, in which the State of Missouri ceded to the United States exclusive jurisdiction over lands acquired by purchase, condemnation, or otherwise, prior to the effective date of the act, as sites for customhouses, courthouses, post offices, arsenals, forts, and other needful buildings required for military purposes. Section 2 of said act is as follows:

"Exclusive jurisdiction in and over any land so acquired, prior to the effective date of this Act, by the United States shall be, and the same is hereby, ceded to the United States for all purposes, saving and reserving, however, to the State of Missouri the right of taxation to the same extent and in the same manner as if this session had not been made; and further saving and reserving to the State of Missouri the right to serve thereon any civil or criminal process issued under the authority of the State, in any action on account of rights acquired, obligations incurred, or crimes committed in said State, but outside the boundaries of such land, but the jurisdiction so ceded to the United States shall continue no longer than the said United States shall own such lands and use the same for the purposes for which they were acquired."

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Section 3 of House Bill No. 397 was an emergency clause in which certain areas of land were enumerated as being in contemplation of the Legislature at that time, among which was Camp Crowder. This enactment, providing for the cession of exclusive legislation, followed generally similar legislation in other states in which the various states preserved merely the right of taxation and the service of process.

The problem which we are confronted is whether or not, by the above enactment, these certain lands ceased to be a part of the State of Missouri so that one taking up domicile thereon could be said to reside in the State of Missouri so as to meet the residence qualifications for voters as contained in the Constitution and Section 11469, supra.

The pertinent portion of our Federal Constitution by which the Federal government has been given the right to legislate over certain land areas is Article I, Section 8, Clause 17, which provides:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings."

Perhaps the leading case on this problem is that of *Herken v. Glynn*, 101 Pac. (2d) 946, where the authorities on the subject are collected. In the course of this opinion the court said, l.c. 950:

"In authorities treating the matter generally, it is said that where a cession of a tract is made by a state to the United States for the purposes mentioned in the above constitutional provision, and there is no reservation of jurisdiction by the state other than the right to serve civil and criminal process on the ceded lands, persons who reside on such lands do not acquire any elective franchise as inhabitants of the ceding state. See McCrary on Elections, 4th Ed., Sec. 89, p. 68; Paine on Elections,

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Sec. 63, p. 44; Kennan on Residence and Domicile, Sec. 493, p. 844; 20 C. J., Elections, Sec. 33, p. 74; 18 Am. Jur., Elections, Sec. 66, p. 224."

Judge Story, a foremost authority on the Constitution of the United States, in discussing Article I, Section 8, Clause 17, had this to say:

"Sec. 1224. The other part of the power, giving exclusive legislation over places ceded for the erection of forts, magazines, etc., seems still more necessary for the public convenience and safety. The public money expended on such places, and public property deposited in them, and the nature of the military duties which may be required there, all demand that they should be exempted from State authority. In truth, it would be wholly improper, that places, on which the security of the entire Union may depend, should be subjected to the control of any member of it. The power, indeed, is wholly unexceptionable; since it can only be exercised at the will of the State; and therefore it is placed beyond all reasonable scruple. Yet, it did not escape without the scrutinizing jealousy of the opponents of the Constitution, and was denounced, as dangerous to State sovereignty.

"Sec. 1225. A great variety of cessions have been made by the States under this power. And generally there has been a reservation of the right to serve all State process, civil and criminal, upon persons found therein. This reservation has not been thought at all inconsistent with the provision of the Constitution; for the State process, quoad hoc, becomes the process of the United States, and the general power of exclusive legislation remains with Congress. Thus, these places are not capable of being made a sanctuary for fugitives, to exempt them from acts done within, and cognizable by, the States to which the territory belonged; and at the same time Congress is enabled to accomplish the great objects of the power.

Honorable Wayne V. Slankard

"Sec. 1227. It follows from this review of the clause, that the States cannot take cognizance of any acts done in the ceded places after the cession; and, on the other hand, the inhabitants of those places cease to be inhabitants of the State, and can no longer exercise any civil or political rights under the laws of the State. But if there has been no cession by the State of the place, although it has been constantly occupied and used, under purchase, or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect."
(Underscoring ours.)

(Story on the Constitution, Fifth Edition, Volume 2, pages 131, 132.)

In the case of McMahon v. Polk, 10 S. Dak. 296, 73 N. W. 77, the court, after quoting Judge Story, said as follows, l.c. 79:

" * * * The doctrine resting upon and sustained by an unruffled current of authority seems to be that all political powers and jurisdiction over a military reservation, not expressly retained by a state, are surrendered absolutely to the general government by a voluntary transfer of lands for the exclusive use of the army or navy; and consequently a person residing thereon acquires none of the constitutional qualifications of an elector. In re Town of Highlands (Sup.) 22 N. Y. Supp. 137; Opinion of Judges, 1 Metc. (Mass.) 580; Sinks v. Reese, 19 Ohio St. 306; Com. v. Clary, 8 Mass. 72; McCrary, Elect. (4th Ed.) Sec. 89. * * *"

In Johnson v. Morrill, 126 Pac. (2d) 873, the Supreme Court of California considered whether or not residents of housing units adjacent to military naval bases and constructed under the authority of the Lanham Act, Public Law No. 849, 76th Congress, 54 Stats. 1125, 42 U.S.C.A., Section 1347, were residents of the State of California so as to be entitled to vote. Section 10 of the Lanham Act (42 U.S.C.A., Section 1547) reads:

"Notwithstanding any other provision of law, the acquisition by the Administrator of any real property pursuant to sub-chapters II-IV

Honorable Wayne V. Slankard

shall not deprive any State or political subdivision thereof, including any Territory or possession of the United States, of its civil and criminal jurisdiction in and over such property, or impair the civil rights under the State or local law of the inhabitants on such property. * * *"

The court held that the right to vote was a civil right and, therefore, was not impaired by the mere fact of Government ownership of the lands in question because the United States had not attempted to exercise exclusive jurisdiction over such lands. The decision turned on the fact that there had been no provision made for exclusive jurisdiction by the United States and that the State of California still controlled such lands and their laws were in force except where they might contravene the purpose for which the lands were being used by the Federal government. The court indicated that the land and buildings thereon were not such that they would come under the operation of Article I, Section 8, Clause 17 of the Constitution, because not being used for any of the purposes contained therein, and reiterated the principle that "the United States cannot be compelled to accept the burdens of exclusive jurisdiction along with the title to land acquired for purposes not strictly within the classes designated in the Constitution." (Silas Mason Co. v. Tax Commission, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187; Atkinson v. State Tax Commission, 303 U.S. 20, 58 S. Ct. 419, 82 L. Ed. 621, 1.c. 879.)

It is well settled that the United States government may acquire land within a state by donation, purchase or condemnation and devote the same to a public use without drawing such lands from the jurisdiction of the state (Surplus Trading Co. v. Cook, 281 U.S. 647, 652, 50 S. Ct. 455, 74 L. Ed. 1091). And it is not questioned that under the law the state may cede and the United States may accept cession of jurisdiction upon any express terms, conditions or reservations (United States v. Unzeuta, 281 U.S. 138, 50 S. Ct. 284, 74 L. Ed. 761), and that the state and the United States may make any suitable agreement with respect to mutual or exclusive exercise of jurisdiction over land acquired or to be acquired by the United States (Collins v. Yosemite Park & C. Co., 304 U.S. 518, 58 S. Ct. 1009, 82 L. Ed. 1502).

In the case of United States v. City of Chester, 144 Fed. (2d) 415, the court said, 1.c. 422:

"If, however, lands were acquired by the United States within a State by purchase or

Honorable Wayne V. Slankard

otherwise with the consent of a state legislature pursuant to Article I, Section 8, Clause 17 of the Constitution, the Federal Government might exercise exclusive jurisdiction over such lands and Congress alone might legislate in regard to them and in respect to the people who inhabited them. As is stated in *Surplus Trading Co. v. Cook*, supra, 281 U.S. at page 652, 50 S. Ct. 456, 74 L. Ed. 1091, "'Exclusive legislation" is consistent only with exclusive jurisdiction.' On the other hand under the decision of *James v. Dravo Contracting Co.*, supra, a State might condition its consent to the acquisition of land by the United States on the retention by the State of jurisdiction for all purposes not inconsistent with those with which the United States was acquiring the land. While it must be assumed that the terms of the consent would determine the extent of the jurisdiction retained by the State in respect to the land and that the qualification of its consent by the State would be effective under the authority last cited, may not the provisions of Section 10 of the Lanham Act have been intended by Congress to be treated as a waiver by the United States of a possible exclusive jurisdiction, or at least as precatory to the end that the United States should not exercise exclusive jurisdiction over lands acquired for housing? We think the answers to these questions should be in the affirmative.
* * *

The Supreme Court of the State of Kansas, passing upon the rights of voters who were residents of housing units constructed under the provisions of the Lanham Act, in the case of *State ex rel. Parker v. Corcoran*, 155 Kan. 714, 128 Pac. (2d) 999, 142 A.L.R. 423, ruled in accord with the California court in the case of *Johnson v. Morrill*, supra. However, in the same opinion, and on another set of facts, the court referred to its previous decision in the case of *Herken v. Glynn*, supra, with respect to residents of land purchased by the Federal government designed for use as a post office building. In line with the above-quoted language in the *City of Chester* case, holding that when the Federal government, under authority of Congress, exercises exclusive legislation over a tract of land situated within the state for any of the purposes mentioned in the provision of the Federal Constitution, the court said, l.c. 428:

Honorable Wayne V. Slankard

"It is well settled in this state, and generally elsewhere, that when the Federal government, under authority of Congress, exercises exclusive legislation over a tract of land situated within the state for any of the purposes mentioned in the provision of the Federal constitution above quoted, and such exercise of exclusive legislation by Congress is consented to by the state under a statute similar to ours above quoted, a resident of such a tract of land is not deemed a resident of the state with authority to vote at state elections. See *Herken v. Glynn*, 151 Kan. 855, 101 P (2d) 946, where the authorities on the subject are collected."

In the particular problem before us we are concerned with land acquired for use as an army camp in carrying out governmental functions of the United States during time of war, and which quite clearly comes under the provisions of Article I, Section 8, Clause 17 of the Constitution. In view of the decisions on the subject, it is our opinion that when exclusive jurisdiction has been ceded by the states to the Federal government of lands to be used for any of the purposes enumerated in Article I, Section 8, Clause 17 of the Constitution, the United States acquires exclusive jurisdiction over such land subject only to such reasonable reservations as may have been mutually agreed upon between the state and the Federal government.

We do not now pass upon the status of persons who are residing on government-owned land purchased under the authority of the Lanham Act, 42 U.S.C.A., Section 1547, or any other act of Congress providing for government purchase of lands within a state for purposes other than those enumerated in Article I, Section 8, Clause 17 of the Federal Constitution.

Inasmuch as the state has ceded exclusive jurisdiction to the land on which Camp Crowder is located, we think that the persons who are residents on this land do not come within the provisions of Article VIII, Section 2 of the Missouri Constitution, and Section 11469, Mo. R. S. A., 1939, so as to become eligible voters.

CONCLUSION

Therefore, it is the opinion of this department that so long as the United States shall own such land and use the same as an

Honorable Wayne V. Slankard

army camp the residents of Camp Crowder do not reside in the State of Missouri so as to become eligible voters.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

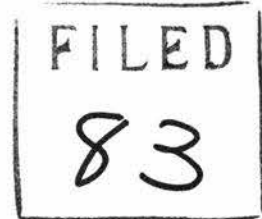
APPROVED:

J. E. TAYLOR
Attorney General

MOTOR VEHICLES:
PUBLIC SERVICE COMMISSION:

A lessee of a truck and driver for a period of less than ten days, for the purpose of transporting for hire property or persons, before operating said truck on the highways, must obtain a certificate of convenience and necessity from the Public Service Commission.

June 9, 1948



Honorable Wayne V. Slankard
Prosecuting Attorney
Newton County
Neosho, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion, which reads:

"I would like your opinion on the following:

"The owner of a motor truck enters into a rental contract with another party, renting the truck to the other party for his use for less than a ten days period, the other party also paying the truck owner for the services of the truck owner's driver. Under such an arrangement would the owner of the truck or the other party be required to secure a Certificate of Convenience or other permit from the Public Service Commission."

We assume from your request, since the party is leasing the truck for less than ten days and also paying the owner of the truck for services of his driver, that the lessee of said truck during the period of said lease is contemplating using said truck for hire of persons or property of someone else, otherwise there would be no need of obtaining a certificate of convenience and necessity from the Public Service Commission.

This department has heretofore ruled that, under such a lease for more than ten days, the lessee becomes a limited owner under the statutes and must, therefore, before operating said

Honorable Wayne V. Slankard

truck on the highways of this state, procure a certificate of registration and proper license plates. We are enclosing a copy of said opinion. However, this department has never ruled on the particular question as to the necessity of such a lessee obtaining a certificate of convenience and necessity from the Public Service Commission before operation of said leased truck over the highways of this state.

Unless said lessee comes within some specific exemption under the Public Service Commission Act, if he is hauling for hire, he must secure a certificate of convenience and necessity or some other similar authority from the Public Service Commission before being permitted to operate said motor vehicle over the highways of this state. Section 8367, R.S.Mo. 1939, defines "owner" as follows:

"* * * The term owner shall include any person, firm, corporation or association, owning or renting a motor vehicle, or having the exclusive use thereof under lease, or otherwise, for a period greater than ten days successively.* * *"

Section 5720, page 523, Subsection (b), Laws of Missouri, 1941, defines "motor vehicle" and "motor carrier," as used in Article 8, Chapter 35, R.S.Mo. 1939, which is a part of the Public Service Commission Act. Said provision contains certain exceptions to said article, and reads in part:

"(a) The term 'motor vehicle,' when used in this article, means any automobile truck, motor bus, truck, bus, or any other self-propelled vehicle not operated or driven upon fixed rails or tracks.

"(b) The term 'motor carrier,' when used in this article, means any person, firm, partnership, association, joint-stock company, corporation, lessee, trustee, or receiver appointed by any court whatsoever, operating any motor vehicle with or without trailer or trailers attached, upon any public highway for the transportation of persons or property or both or of providing or furnishing such transportation service, for hire as a common carrier: Provided, however, this article shall not be so construed as to apply to motor vehicles used in the transportation of passengers or property for hire, operating over and along regular routes within

Honorable Wayne V. Slankard

any municipal corporation or a municipal corporation and the suburban territory adjacent thereto, forming a part of transportation system within such municipal corporation or such municipal corporation and adjacent suburban territory, where the major part of such system is within the limits of such municipal corporation. And provided further, this article shall not be so construed as to apply to motor vehicles operated between the State of Missouri and an adjoining state when the operations of such motor vehicles within the State of Missouri are limited exclusively to a municipality and its suburban territory as herein defined."

Sections 5723 and 5724, R.S.Mo. 1939, vest in the Public Service Commission authority to license, supervise and regulate every motor carrier in this state and fix and approve rates, fares, etc. Said sections further make it unlawful for any motor carrier to operate for hire without a certificate of convenience and necessity, and read in part:

"(a) The public service commission is hereby vested with power and authority, and it shall be its duty to license, supervise and regulate every motor carrier in this state to fix or approve the rates, fares, charges, classifications, and rules and regulations pertaining thereto; to regulate and supervise the accounts, schedules, service and method of operating of same; to prescribe a uniform system and classification of accounts to be used, which among other things shall set up adequate depreciation charges, and after such accounting system shall have been promulgated, motor carriers shall use no others; to require the filing of annual and other reports and any other data; and to supervise and regulate motor carriers in all matters affecting the relationship between such motor carriers and the public.

* * * *

"(c) All laws relating to the powers, duties, authority and jurisdiction of the public service commission over common carriers

Honorable Wayne V. Slankard

are hereby made applicable to all such motor carriers, except as herein otherwise specifically provided.

"(d) A motor carrier not operating over a regular route may, within the territory permitted to be served by him, receive persons or property at a point located on a regular route and destined to a point not located on a regular route, and receive persons or property at a point not located on a regular route and destined to points on a regular route.

"(e) It shall be unlawful for any motor carrier, except one having a certificate of convenience and necessity authorizing such service, to accept persons or property for transportation from a point on a regular route destined to a point on a regular route, or where through or joint service is being operated between such points, and any motor carrier so offending shall be guilty of a misdemeanor and punished as provided by section 5731."

"Sec. 5724. * * * (a). It is hereby declared unlawful for any motor carrier to operate or furnish service as a common carrier within this state without first having obtained from the commission a certificate declaring that public convenience and necessity will be promoted by such operation. The commission upon the filing of a petition for a certificate of convenience and necessity shall within a reasonable time fix a time and place for hearing thereon. * * *"

The Supreme Court of this state has held that jurisdiction to issue certificates of convenience and necessity lies with the Public Service Commission. In *State v. Dixon*, 73 S.W. (2d) 385, 1.c. 388, 335 Mo. 478, the court said:

"Our statute is similar in that the Public Service Commission was created as an administrative body with authority to regulate public utilities of this state as well as the transportation for hire of passengers and

Honorable Wayne V. Slankard

freight over the highways. It is an elaborate system covering the entire field of regulation.* * * *

Also, see State v. Public Service Commission, 179 S.W. (2d) 123, 1.c. 128, wherein the court said:

"With such purpose in mind, the legislature delegated to the commission the authority to issue certificates 'if in the opinion of the commission the public convenience and necessity will be promoted by so doing.' Sec. 5724. The Commission has a discretion in determining whether a certificate of convenience and necessity shall issue. Of course, it cannot act unlawfully or unreasonably; if so, the courts will correct such action. * * * *

* * * *

"By statute, the Commission's discretion in issuing a certificate is to be controlled by three principal considerations: (1) The transportation service being furnished by other carriers; (2) the permanency and continuity of the proposed service; and (3) the effect which the proposed service may have upon other existing forms of transportation service. State ex rel. Detroit-Chicago Motor Bus Co. v. Public Service Commission, 324 Mo. 270, 23 S.W. 2d 115. We find in the instant case the Commission gave consideration to all three propositions and its conclusions are amply supported by the evidence."

CONCLUSION

Therefore, it is the opinion of this department that a person leasing a truck from the owner of said truck even for a period of less than ten days, must before operating said truck over the highways of this state obtain a certificate of convenience and necessity from the Public Service Commission, if said lessee is going to operate said truck for hire of property or persons and he does not come within the exceptions contained in Sections 5720 and 5723, supra.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

STATE BOARD OF : Board of Training Schools loses control of
TRAINING SCHOOLS : person transferred to adult correctional
: institution.

June 9, 1948.

FILED

83

6-11
Honorable Francis Smith,
Attorney at Law,
Tootle Bldg.,
St. Joseph, Missouri.

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"The Board of Training Schools of the State of Missouri of which I am a member has directed that I present to you for your interpretation the following questions:

"Under the provisions of Senate Bill 289, subsection (2) of Section 8996 it is provided that our board may, for the purpose of discipline with the approval of the governor transfer any person committed to its custody to any state adult correctional institution. It is further provided that:

"Any such person shall be subject in all respects to the discipline of the adult correctional institution to which he is transferred and shall be entitled to all of the rights provided for persons committed to such institutions * * *

"The section further provides:

"The Board may after hearing release any such person on parole with like effect and under the same circumstances as if he had remained in the custody of the Board."

"Our inquiries as to the above section are as follows: If the Board transfers a person to the state penitentiary at Jefferson City under this section does the Board retain any control whatever over such person except the power to parole?

"The section provides that such person shall be subject in all respects to the discipline of the adult correctional institution. In the parole

power which is the last sentence in the subsection it is stated that the Board may release upon parole 'as if he had remained in the custody of the Board'. Is that a direct implication that he is no longer in the custody of the Board after the transfer?

"Does the Board have the power, for example, to re-transfer one of these persons back to Boonville after he has been transferred to the penitentiary? When the time comes for the person to be released, for example, on the termination of his sentence, is he to be discharged at Boonville or discharged at the state penitentiary to which he has been transferred, or does the Board have any option?

"Further, under the provision 'shall be entitled to all of the rights provided for persons committed to such institutions', does a Boonville charge after being transferred to the state penitentiary come under their ninth-twelfths rule and other rules applying to ordinary inmates of the penitentiary?

"The Board is interested in your interpretation of this particular sub-section."

Section 8996 (2) of Senate Bill 289, 64th General Assembly, reads in full as follows:

"The board may, for the purpose of discipline, with the approval of the Governor, transfer any person committed to its custody, to any state adult correctional institution. Any such person shall be subject in all respects to the discipline of the adult correctional institution to which he is transferred and shall be entitled to all of the rights provided for persons committed to such institutions, except that no person committed to the Board for an indeterminate period of time shall be confined in such adult correctional institution after reaching the age of twenty-one years. The Board may, after hearing, release any such person on parole with like effect and under the same circumstances as if he had remained in the custody of the Board."

The only other references in the act to transfer are found in Section 9005, providing for the payment of support in the

event of transfer, and in the emergency clause of the act, which reads as follows:

"There being no adequate provision for care and custody of juveniles in the training schools of the State, and particularly, no adequate provision for transfer of certain persons in such training schools to adult correctional institutions where need exists, and same being necessary for the immediate preservation of the public health, peace and safety, an emergency exists within the meaning of the Constitution, and this act shall be in effect from and after its passage and approval." (Emphasis ours.)

There is nothing in the act defining authority of the State Board of Training Schools over a person transferred to an adult correctional institution, other than that regarding paroles. Nor does the act make any provision for the retransfer to the custody of the Board of Training Schools of persons transferred to an adult correctional institution. In view of the Legislature's failure to make such provision, we are of the opinion that the act must be construed to mean that upon transfer to the adult correctional institution, the Board of Training Schools loses all control of the person transferred, except for the purpose of granting parole. There being no other indication of the Legislature's intention in this regard, the rule of statutory construction "expressio unius est exclusio alterius" is deemed applicable in arriving at the intention of the Legislature.

The language contained in the provision relating to parole appears to support this interpretation inasmuch as it uses the language "as if he had remained in the custody of the board". This definitely indicates, we feel, that the Legislature intended the Board of Training Schools to part with the custody and control of a person transferred, except for the specified matter of parole. In addition, in adopting other legislation permitting the transfer of persons committed to one institution to another, the Legislature has seen fit to make express provision for re-transfer to the institution to which the person was originally committed.

Section 9118 (b) Mo. R. S. Ann., providing for the transfer of persons committed to the intermediate reformatory to the penitentiary, expressly provides that a person transferred may be returned to the reformatory upon request of the superintendent. In view of such express provision in that law, the failure of

Honorable Francis Smith,

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the Legislature to make such provision in the act in question is considered significant.

As far the rights to which the person transferred is entitled to at the adult correctional institution, we are of the opinion that the Legislature intended that the person transferred should have the benefit of Section 9086 Mo. R. S. Ann., which provides for release upon serving three-fourths of the time for which sentenced in an orderly and peaceable manner, without infraction of the rules. That right, and the right to 5% of the wages earned, provided by Section 9048 Mo. R. S. Ann., appear to be the only statutory rights which might have been considered by the Legislature in enacting this section.

CONCLUSION.

Therefore, we are of the opinion that, upon the transfer by the State Board of Training Schools of a person to an adult correctional institution, and in accordance with Section 8996 (2) of Senate Bill 289, 64th General Assembly, the Board of Training Schools thereby relinquishes all custody and control of the person transferred, except for the purpose of parole. That such person may not be retransferred to the custody of the State Board of Training Schools, and that upon completion of his sentence he is to be discharged at the institution to which he had been transferred.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J.E.T.*

RRW/LD

DIVISION OF PROCUREMENT: Duties of the State Purchasing Agent,
: with reference to contract for the
: erection of new buildings, repair and
: alteration of existing structures, and
: installation of equipment.

August 2, 1948

FILED

83

g.5
Honorable William L. Smith
State Purchasing Agent
Division of Procurement
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"I am receiving numerous requisitions from the State Teacher's Colleges, Eleemosynary and Penal institutions, for the construction of new buildings, repairing and alterations of buildings, installation of new boilers, engines and power house equipment, all on post-war funds.

"I would like to ask your opinion if the Division of Procurement, or the Purchasing Agent, is to seek bids and make the awards for such construction work, or who shall perform this duty.

"Also, please clarify Sections 71, 72 and 73 of S.C.S.S.B. No. 297, pertaining to contracts."

The Division of Procurement, of which the State Purchasing Agent acts as the head, was created as a part of an Act found Laws of Missouri, 1945, page 1428. The duties of the Division may generally be said to be those pertaining to the acquisition of materials and supplies, printing, etc., for the various departments of the State, with certain noted exceptions. None of the exceptions are pertinent to the matter now under consideration.

It is noted that your inquiry relates to three distinct types of contracts namely; 1) those for the erection of new buildings; 2) those for the alteration

or repair of existing structures and, 3) those for the purchase of equipment, such as boilers, engines, etc. We shall consider them in the order named.

It has long been the public policy of the State of Missouri to provide for the creation of Building Commissions to contract for and supervise the erection of new buildings. In passing, we direct your attention to the various statutory enactments creating the Supreme Court Building Commission, the State Office Building Commission, the State Building Commission, and others of like nature. However, with respect to the erection of new buildings for the various state colleges, eleemosynary institutions and penal institutions, no such specific agencies have been created. It therefore, is necessary to determine whether or not such duties have devolved upon the Division of Procurement or the State Purchasing Agent.

Section 64 of the Act mentioned, supra, creating the Division of Procurement, reads as follows:

"Section 64. Shall purchase all supplies and lands and negotiate leases.--The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Section 73 of the Act reads as follows:

"Section 73. Definition of terms.--The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be

deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

(Underscoring ours.)

With the exception of other sections relating to the purchase of the public printing and binding, there seem to be no other portions of the Act which might be construed to relate to the subject-matter of your inquiry. It is noted that neither of the quoted sections specifically impose upon the Division of Procurement nor the State Purchasing Agent the duty to contract for the erection of new buildings. The only possible phraseology employed in either of the sections which might lead to such a conclusion is found in the underscored portion of Section 73: "supplies, materials, equipment, contractual services and any and all articles or things."

Section 655, R.S. Mo. 1939, contains certain rules relating to the construction of statutes. Among such rules is found the following:

"* * * First, words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import; * * * ."

Applying this rule to the definitions contained in Section 73, it becomes apparent that new buildings are not included within the category of items to be acquired through contract on behalf of the State or any department thereof, by the Division of Procurement or the State Purchasing Agent. This construction is borne out by reference to other sections of the Act creating that Division, notably, Sections 68, 69, 70, 71 and 72.

The term "supplies" therein has been used in the sense of referring to items of recurrent usage, and of a more or less standard nature which are to be acquired by the various departments of the State Government. Apparently, the word is not broad enough to encompass a new building.

What has been said above, with reference to contracts for the erection of new buildings, we believe, is equally applicable to contracts for the repair or alteration of existing structures.

With respect to the purchase of equipment for installation in a new building, in an altered or repaired building, or in an existing structure, we believe a different situation presents itself. You will note that the definition of the term "supplies" found in Section 73, quoted, supra, specifically includes equipment. We believe then that by the inclusion specifically of the word "equipment" it was the intent of the Legislature to require contracts therefor to be negotiated by the State Purchasing Agent for and on behalf of the departments of the State requiring the same. A reason for this might very well be in the fact that items of equipment, at least until attached to the realty, are different in their characteristics from new buildings which are in the nature of permanent improvements and are not so readily subject to standardization.

We are persuaded to this opinion by reason of the long established public policy of the State of Missouri, with respect to the erection of new buildings, as contradistinguished from the procedure with respect to the acquisition of equipment, materials and supplies of a more standardized nature.

CONCLUSION.

In the premises, we are of the opinion that no duties have been placed by law upon the Division of Procurement nor the State Purchasing Agent, with respect to the negotiation of contracts for the erection of new buildings for the various departments of the State, nor with respect to such contracts for the repair or alteration of existing structures.

We are further of the opinion that it is the duty of the State Purchasing Agent to negotiate contracts on behalf of the various departments of the State for the acquisition of items of equipment.

Respectfully submitted,

APPROVED:

WILL F. BERRY, Jr.
Assistant Attorney General

J. E. TAYLOR *JTB*
Attorney General

WFB:ir

PUBLIC WORKS: Missouri State Board of Training Schools is authorized to negotiate contracts for the erection of new buildings.

September 1, 1948

FILED
83

9-13

Honorable Francis Smith, Member
Missouri State Board of Training Schools
Tootle Building
St. Joseph, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"Under date of August 2 your office issued an opinion that neither the Division of Procurement nor the State Purchasing Agent are charged with the negotiation of contracts for the erection of new buildings nor for the repair or alteration of existing state structures.

"In view of that situation, can your office advise our board whether or not in your opinion our board can negotiate these contracts, or what state authority will assume that responsibility. I refer particularly to a building program which is under consideration, particularly the Missouri Training School for Boys at Boonville and also the Girls School at Chillicothe. We are entrusted with the expenditure of large sums from the post war reserve funds and are at the present time considering immediate advertising for bids for the performance of such work."

The Missouri State Board of Training Schools has been created under the provisions of Section 38 of Article IV of the Constitution of Missouri, 1945. It reads as follows:

"All state training schools and industrial homes for boys and girls shall be classified as educational institutions and shall be in charge of a board of six trustees, three from each of the two major political

parties, appointed by the governor by and with the advice and consent of the senate. All employees of the board shall be selected and removed as provided for employees in the state eleemosynary institutions."

Subsequent to the adoption of the above quoted constitutional provision, the General Assembly of Missouri enacted Section 8992.20, Mo. R.S.A., appearing Laws of Missouri, 1945, page 723, Section 20. This statute reads as follows:

"There is hereby created and established a state board of training schools which shall have charge and control of all training schools and industrial homes for boys and girls of this state: specifically, the training school for boys at Boonville; the industrial home for girls at Chillicothe, which hereafter shall be known as the training school for girls; and the industrial home for Negro girls at Tipton, which hereafter shall be known as the training school for Negro girls, together with all branches and divisions thereof; and over all institutions for correctional training of juveniles which may hereafter be created in this state; which schools are hereby classified as educational institutions and recognized to have as their purpose the special correctional training, the education and the moral rehabilitation and guidance of juvenile offenders which any court of proper jurisdiction may assign to such institutions. In relation to any of the above named juvenile training schools, whenever the term commission of penal institutions is used in any act, it shall hereafter be understood to mean the state board of training schools."

(Underscoring ours.)

We have emphasized the last sentence of the quoted statute for the reason that other statutory enactments incorporated therein by such reference are pertinent to the subject matter of your inquiry. We refer particularly to Section 8987, R. S. Mo. 1939, reading in part as follows:

" * * * The Commission is authorized to erect on such lands when leased or purchased such buildings for hospitals, dormitories, reformatories and other structures or improvements as it may with the approval of the Governor, deem necessary and proper for the welfare of the prisoners. * * * "

This statutory delegation of authority to the Commission of the Department of Penal Institutions has been transferred to the State Board of Training Schools, under the emphasized portion of Section 8992.20, Mo. R.S.A. We think that such delegation of authority, being clear and unambiguous in its terms, is sufficient authorization to the State Board of Training Schools to negotiate for the erection of new structures or the alteration or repair of existing structures at the several institutions under the control and management of such Board.

It is thought, however, that the State Board of Training Schools must enter into such contracts only after following the appropriate procedure outlined by other statutes relating to advertising, letting of bids, method of payment of contracts, etc., relating to public works. Particularly your attention is directed to paragraph (d) of Section 11008.118, Mo. R.S.A., requiring the approval of the Director of Public Buildings of all such contracts and payments made thereunder.

CONCLUSION

In the premises, we are of the opinion that the Missouri State Board of Training Schools is authorized to negotiate and enter into contracts for the erection of new structures or the alteration or repair of existing structures at institutions under the management and control of such board, subject to other statutory requirements respecting the exercise of such authority.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

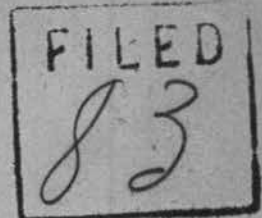
J. E. TAYLOR
Attorney General

JET

WFB:VLM

DIVISION OF PROCUREMENT: State purchasing agent to contract for maintenance service of equipment.

September 23, 1948



Mr. William L. Smith
State Purchasing Agent
Division of Procurement
Jefferson City, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office, reading as follows:

"I would appreciate your opinion as to whether or not the State Purchasing Agent has the right to contract for any maintenance service, such as Elevator service, Typewriter or Adding Machine and other contract services pertaining to the up keep of State equipment, or any equipment operated by electric power."

Your attention is directed to Section 64 of an act found in Laws of Missouri, 1945, page 1428, which reads as follows:

"The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

Also to Section 73 of the same act, reading as follows:

"The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be deemed to mean

department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

Upon reading the foregoing sections, it is noticed that insofar as the purchase of electrical power is concerned, such purchases are to be made by the State Purchasing Agent, inasmuch as contractual services of that type have been specifically included. We, therefore, reach the conclusion that it is the duty of the State Purchasing Agent to negotiate all contracts for the acquisition of electric power required by any of the various governmental departments subject to the provisions of the statute relating to the Division of Procurement.

We think, too, that maintenance services of the types referred to in your letter of inquiry are completely within the meaning of the term "supplies" as used in the act. While technically, perhaps, a contract for the maintenance of elevators, adding machines, comptometers, typewriters and similar equipment is not strictly within the ordinarily accepted definition of the term "supplies," yet we believe that an examination of the entire act relating to the Division of Procurement indicates a legislative intent that the State Purchasing Agent acquire, on behalf of the various governmental departments, all items of a currently expendable nature. Giving due regard to the fact that contracts of the type here under consideration are normally entered into upon an annual basis and simply provide for the periodical inspection of such equipment and replacement of parts necessary to maintain the same in operating condition, it seems that the substance of the purchases made thereunder may well be deemed to be included within the term "supplies."

CONCLUSION

In the premises we are of the opinion

(1) That it is the duty of the State Purchasing Agent to negotiate all contracts for the acquisition of electric power for the governmental departments subject to the provisions of the act relating to the Division of Procurement; and,

Mr. William L. Smith

-3-

(2) That it is the further duty of the State Purchasing Agent to negotiate all contracts for the maintenance of elevators, typewriters, comptometers and similar office machines wherein the subject matter of such contracts relates to the periodical inspection and replacement of necessary parts of such equipment on behalf of the governmental departments subject to the provisions of the act relating to the Division of Procurement.

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *JB*

WFB:VLM

3.71
12/8/48
MUNICIPAL CORPORATIONS)
AND TAXATION)

State not subject to
Ordinance No. 44678
of the City of St. Louis
(Earnings tax).

October 29, 1948

FILED
83

11-15
Honorable Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Mr. Smith:

This will acknowledge receipt of your letter of recent date which reads as follows:

"Ordinance No. 44678 of the City of St. Louis effective September 1, 1948 imposes an earnings tax on salaries and other incomes in the city.

In as much as there are many state employees working in St. Louis, will the state be required to withhold the earnings tax imposed by this ordinance from salaries paid state employees? We should like to have your opinion.

A copy of this ordinance is enclosed for your study."

House Bill No. 475, passed by the 64th General Assembly, authorized the City of St. Louis to levy and collect an earnings tax. Section 1 of said bill reads as follows:

"Section 1. Any constitutional charter city in this state which now has or may hereafter acquire a population in excess of 700,000 inhabitants, according to the last Federal decennial census, is hereby authorized to levy and collect, by ordinance for general revenue purposes, an earnings tax on salaries, wages, commissions and other compensation earned by its residents; on salaries, wages, commissions and other compensation earned by non-residents of the city for work done or services performed or rendered in the city; on the net profits of associations, businesses or other activities conducted by residents; on the net profits of associations, businesses

or other activities conducted in the city by non-residents; and on the net profits earned by all corporations as the result of work done or services performed or rendered and business or other activities conducted in the city."

Pursuant to the authority granted it by H. B. 475, the City of St. Louis enacted Ordinance No. 44678. Section 2 of said ordinance provides as follows:

"Section Two. A tax for general revenue purposes of one-half of one per centum is hereby imposed on (a) salaries, wages, commissions and other compensation earned after August 31, 1948, by resident individuals of the City, including the entire distributive share of any member of a partnership or association, less the amount thereof, if any, which may be shown to have been taxed under the provisions hereof to said association or partnership; and on (b) salaries, wages, commissions and other compensation earned after August 31, 1948, by non-resident individuals of the City, for work done or services performed or rendered in the City; and on (c) the net profits earned after August 31, 1948, of associations, businesses, or other activities conducted by a resident or residents, and on (d) the net profits earned after August 31, 1948, of associations, businesses, or other activities conducted in the City by a non-resident or non-residents; and (e) on the net profits earned after August 31, 1948, by all corporations as a result of work done or services performed or rendered, and business or other activities conducted in the City."

Since the question submitted by you involves the salaries earned by employees of the State of Missouri in St. Louis, we are only concerned with subdivisions (a) and (b) of the foregoing section. It will be seen that the ordinance levies a tax on the salaries, wages, commissions and other compensation earned by residents of the City of St. Louis or paid to non-residents of the city for work done or services performed in the city. The tax is a tax on the earnings, and it is not

a tax against the employer. Section 5 of said ordinance requires the individual earning a salary as above mentioned to file a return with the collector of said city setting forth his salary during the preceding calendar year. Said section reads in part as follows:

"Section Five. Except as hereafter provided each individual, association, business, corporation, fiduciary, or other entity, whose earnings or profits are subject to the tax imposed by this ordinance shall, on or before March 30th of each year, unless an extension is granted by the Collector, make and file with the Collector a return, on a form obtainable from the Collector, setting forth the aggregate amount of salaries, wages, commissions, compensation or net profits earned by such taxpayer during the preceding calendar year and subject to the said tax, together with such other pertinent information as the collector may require: * * * Provided, however, that where any portion of the tax so due shall have been deducted at the source and shall have been paid to the Collector by the employer making the said deduction, credit for the amount so paid shall be deducted from the amount shown to be due, and only the balance, if any, shall be due and payable at the time of the filing of said return:

Provided, further, that no return shall be required of any taxpayer who has received only wages, salaries, commissions or other compensation and from which the tax has been withheld at the source, as hereinafter provided. The failure of any employer or any taxpayer to receive or procure a return form shall not excuse such employer or taxpayer from making a return or paying the tax due."

It will be seen by Section 5 that even if the tax due by an individual is not withheld by his employer, the individual is obligated to pay the tax nonetheless.

Section 6 of said ordinance provides in part as follows:

"Section Six. Every employer within the City who employs one or more persons on a salary, wage, commission, or other compensation basis, shall deduct at the time of the payment thereof, the tax of one-half of one per centum of salaries, wages, commissions or other compensation due by the said employer to the said employee and subject to tax, and shall quarterly make his return and pay to the said Collector, on the 30th day of April, July, October and January of each year, the amount of taxes so deducted for the three calendar months next preceding the month in which the return is required to be filed:"

It will be seen by Section 6 that "every employer within the city" is required to withhold the tax from the salaries of persons subject to said tax. Section 1 of said ordinance defines "employer" as follows:

"'Employer'--An individual, association, corporation (including a corporation not for profit), governmental administration, agency, arm, authority, board, body branch, bureau, department, division, subdivision, section or unit, or any other entity, who or that employs one or more persons on a salary, wage, commission, or other compensation basis, whether or not such employer is engaged in business as hereinbefore defined."

It will be noted that the state is not included under the definition of employer. Even though employees of the state are assigned to work within the City of St. Louis, they are nevertheless employees of the State of Missouri. They receive their pay from the State of Missouri. They are not employees of a department or governmental administration, but they are employees of the state. We do not think that it can be said that the State of Missouri is an employer within the City of St. Louis, and hence, we do not believe the ordinance in question intended to attempt requiring the State of Missouri to withhold the taxes due under said ordinance.

Another portion of the ordinance which we think shows that the city did not intend to include the State of Missouri is Section 7 of said ordinance which reads as follows:

"Section Seven. Every employer collecting and remitting the tax herein provided ~~for~~ on any resident or non-resident employee shall be entitled to deduct and retain three per centum of the total amount so collected as compensation to the employer for collecting and remitting the tax."

We do not think the city was undertaking to provide compensation for the State of Missouri. Moreover, Section 12 of said ordinance provides for penalties for its violation as follows:

"Section Twelve. Any person or taxpayer who shall fail, neglect or refuse to make any return required by this ordinance; or any employer who shall fail, neglect or refuse to withhold or pay over to the City any amount of tax subject to withholding hereunder, or any person or taxpayer who shall refuse to permit the Collector, or his duly authorized deputy or agent, to examine his books, records or papers, or who shall knowingly make an incomplete, false or fraudulent return, or who shall attempt to do anything whatsoever to avoid the full disclosure of the amount of earnings or profits, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than Five Hundred Dollars (\$500.00) or by imprisonment for not more than six (6) months, or by both such fine and imprisonment."

It will be noticed that any person who fails or refuses to make any return required by the ordinance is subject to a penalty. Section 6 of the ordinance, supra, requires every employer to make a return quarterly of the taxes withheld. As pointed out above, the State of Missouri is the employer of the employees mentioned in your letter. We do not believe the city had in mind that it could prosecute the State of Missouri for failure to file a return. Likewise, Section 12 provides that

an employer who fails to withhold the tax is subject to a penalty. We do not believe the city had in mind that it could penalize the State of Missouri for not paying the tax. The state officials who would refuse to make a return or to withhold the tax could not be prosecuted under this ordinance for the reason that they are not the employers and, hence, are not required to make a return or to withhold the tax.

We are of the opinion, therefore, that the ordinance itself shows that the city did not have in mind trying to require the State of Missouri to comply with the provisions of this ordinance. It is, therefore, not necessary to go into the question as to whether or not the city could require the state to comply with the ordinance.

Conclusion

It is, therefore, the opinion of this office that the State of Missouri is not required to withhold from the earnings of its employees who reside or work in the City of St. Louis the tax imposed by Ordinance No. 44678 of the City of St. Louis nor to make any of the returns required by said ordinance.

Yours very truly,

HARRY H. KAY,
Assistant Attorney General

APPROVED:

J. E. TAYLOR,
Attorney General.

HHK/vlv

*Two copies
to Mr. J
Holmes*

CIRCUIT JUDGES:
COMPENSATION AND EXPENSES:

Circuit judge when holding court outside of his circuit is entitled to five cents per mile, and ten dollars per day.

December 3, 1948

12-6

FILED

83

Honorable Forrest Smith
State Auditor, State of Missouri
Jefferson City, Missouri

Dear Sir:

Attention: Mr. E. L. Pigg

This is in reply to yours of recent date wherein you request an opinion from this department on the question of what amount a special judge shall receive for his expenses while holding court in a county outside his circuit.

The law relating to salaries of circuit judges is found in Laws Missouri, 1945, page 1522. Section 4 of this Act, which provides for travel allowance of judges while in their own circuits, is as follows:

"Each judge of a judicial circuit composed of a single county which now has or may hereafter have less than 200,000 inhabitants and in which circuit court is held in more than one place and each judge of the circuit court whose circuit consists of more than one county, shall receive in addition to the salary provided for said judges in Section 2 of this act, the sum of ten cents per mile actually traveled and all other expenses incident to holding of all terms of court at any place in his county or circuit other than the place of his residence, and such sum of money for said expenses shall be paid out of the state treasury in monthly installments in the same manner as salaries of such judges are paid."

It will be noted that such judges are allowed ten cents per mile actually traveled and on other expenses incident to holding court at any place in his county or circuit other than the place of residence.

Section 5 of the same Act provides for expenses and compensation when such a judge is serving outside of his regular circuit. This section reads as follows:

"Each of the judges hereinbefore mentioned when temporarily serving, transferred or assigned as a judge of a court other than the one to which appointed or elected, said court to which temporarily assigned or transferred being held in a circuit other than the circuit in which such judge resides, in addition to the salary and expense money hereinbefore provided, shall receive from the state for his expenses mileage at five cents a mile for each mile traveled in going to or returning from the place where court is held and \$10.00 per day for each day so engaged."

We gather from your letter, and the memoranda attached thereto, that the question propounded has arisen on account of the two constructions placed on these sections. One construction is that the five cents per mile and ten dollars per day for each day engaged in holding court may only be paid to such judge, while the other construction is that such judge may receive, in addition to the said five cents per mile and ten dollars per day, expenses incident to holding court, which, under Section 4 of the Act, have been construed to include board and lodging.

The first construction seems to be based on the fact that the lawmakers used the language in Section 5, "shall receive from the state for his expenses mileage at five cents a mile * * * and ten dollars per day * * *". The other construction is on account of the language used in said Section 5, which says, "in addition to the salary and expenses hereinbefore provided * * *".

In the case of Whelan vs. Buchanan County, 111 S.W.(2d) 177, 180, the court stated a rule of statutory construction which we think would be applicable here. It is "statutes relating to the same subject are to be construed together and, if possible, harmonized and effect given to all provisions." These different sections of the statute which we have been considering deal with one subject matter, that is; salary and expenses of circuit judges.

The lawmakers, in framing Section 5 of this act, used the word "expenses" before the word "mileage". This word as used in this section and without any punctuation tends to confuse one in trying to construe the Act. However, in order to give each section of the Act a meaning and harmonize the entire Act we think that the lawmakers intended that the compensation provided for in Section 5 of the Act, that is, five cents per mile and ten dollars per day was to be the full compensation for expenses for the judge while holding court outside of his circuit. To place the other construction on this Act would allow such judge double

mileage and double expenses which we do not think the lawmakers intended to do. We also think this construction is in harmony with the general rules of statutory construction and that said Section 5 is especially applicable to compensation of judges when they are serving in a court outside of their own circuit.

CONCLUSION

From the foregoing, it is the opinion of this department that a judge, who is temporarily serving as a judge of a circuit court in a circuit other than the one in which he is appointed or elected, is entitled, for expenses, five cents per mile for each mile traveled in going to or returning from the place where court is held and ten dollars per day for each day so engaged, that this compensation is in addition to the regular salary of such judge to which he is entitled under Section 2 of the Act relating to salaries of circuit judges.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw

TAXATION:
MERCHANTS' TAX:
PERSONAL PROPERTY TAX:

Stock of goods in store in Boone County, owned by resident of Randolph County, assessed in Boone County; fixtures in such store assessed in Randolph County. Stock of goods located in city, owned by individual who lives in county, assessed in city; fixtures in such store, assessed only in county. When stock of goods or fixtures in store are owned by corporation, property is taxed wherever located.

February 13, 1948

FILED

84

2/17

Honorable George A. Spencer
Representative, Boone County
517 Guitar Building
Columbia, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"The question has come to my mind with reference to a discussion with our Assessor, and also in considering the law, and I would like to have your official opinion within the next ten days, if at all possible, dealing with the following matter:

- "1. Would Boone County assess a stock of goods in a store located in Boone County but owned by a resident of Randolph County, or would that stock of goods be assessed in Randolph County?
- "2. Would the same answer to the above question apply to the fixtures used in the operation of said store?
- "3. Would this same answer arise with reference to the question as to whether a city would tax the stock of goods owned by an individual who lives in the county but not in the city?
- "4. Would the same answer apply to fixtures owned by a non-resident of the city but a resident of the county?

"I think the same question runs through all of these different conditions and that is for the purposes of personal property assessment and taxation. Is

the property assessed at the place of residence of the owner or at the situs of the property? Would there be a different answer where it is owned by a corporation under similar circumstances?"

We are enclosing a copy of an official opinion of this department rendered to Hugh Phillips under date of January 16, 1947, which holds that the merchants' tax in this state is a constitutional levy.

Since Section 6, Laws of Missouri, 1945, page 1800, provides that, for the purpose of state, county and municipal taxes, merchandise held by merchants is a class separate and distinct by itself, the provision of Section 8, Laws of Missouri, 1945, page 1801, stating that all tangible personal property situated in a county other than that in which the owner resides shall be assessed in the county where the owner resides, does not apply to an individual who owns merchandise in a county other than that in which he resides.

Section 11304, Laws of Missouri, 1945, page 1839, provides that no person, corporation, copartnership or association of persons shall deal as a merchant without a license first obtained according to law.

Section 11305, Laws of Missouri, 1945, page 1839, provides that merchants shall pay an ad valorem tax equal to that which is levied upon real estate, on the highest amount of all goods, wares and merchandise which they have in their possession or under their control at any time between the first Monday in January and the first Monday in April in each year.

Section 11306, Laws of Missouri, 1945, page 1962, provides that, when a license is applied for, before the license is received, a bond must be executed, conditioned that the merchants' tax will be paid on or before the 31st day of December following.

Section 11325, Laws of Missouri, 1945, page 1845, provides that no license issued shall authorize any person, corporation or copartnership of persons to deal in the sale of goods, wares and merchandise in any other county than the one in which said license was granted.

It is clear, under the above cited statutes, that the ad valorem tax is assessed on goods, wares and merchandise in the county where the license is issued, and that the only county which may issue a license to a merchant is the one in which the

store of the merchant is located. Therefore, a stock of goods in a store located in Boone County, owned by a resident of Randolph County, would be assessed in Boone County.

Since the merchants' ad valorem tax applies only to goods, wares and merchandise, Section 8, Laws of Missouri, 1945, page 1801, governs the place of taxation of fixtures, which are personal property of the owner, and in case the fixtures of a store located in Boone County were owned by a resident of Randolph County, such fixtures would be assessed in Randolph County.

With regard to your question as to whether a city can tax a stock of goods owned by an individual who lives in the county but not in the city, you do not state to what class of cities you refer, but we believe the general rule can be shown by reference to Section 6936, R. S. Mo. 1939, which authorizes cities of the third class to levy upon merchants an ad valorem tax equal to that which is levied on real estate, and provides that the amount of the tax shall be determined and ascertained in the same way as the state and county tax is determined and ascertained.

Since the Legislature, as pointed out, supra, has made a separate class or subclass of merchants' goods, we believe that Section 6936, R. S. Mo. 1939, which applies to all merchants in the city, authorizes the imposition of the ad valorem tax upon a stock of goods in a store in a city even though the residence of the merchant is in the county.

With regard to your question as to the taxation of fixtures owned by a nonresident of the city but a resident of the county, we are enclosing a copy of an official opinion rendered under date of May 20, 1938, to J. A. Gregory, in which it is held that persons living outside the city limits are not subject to a city tax on their personal property.

Since, under the provisions of Section 9, Laws of Missouri, 1945, page 1801, all tangible personal property of business and manufacturing corporations is taxable in the place where situated, the answer to all the questions you have asked with regard to corporations is that both the goods, wares and merchandise and the fixtures in stores which are owned by corporations are taxable wherever they are situated.

CONCLUSION

It is the opinion of this department that:

(1) A stock of goods in a store located in Boone County, owned by a resident of Randolph County, is assessed in Boone County.

(2) The fixtures in a store located in Boone County, owned by a resident of Randolph County, are assessed in Randolph County.

(3) A city can tax the stock of goods owned by an individual who lives in the county but not in the city.

(4) A city cannot tax the fixtures, which are personal property, owned by a nonresident of the city but a resident of the county.

(5) The goods, wares and merchandise and fixtures owned by a corporation are taxable wherever situated.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JB*
Attorney General

CBB:HR

LEGALITY OF COUNTY : 1. Bond not sufficient in amount.
HIGHWAY ENGINEER'S 2. Bond insufficient because qualifica-
BOND. tion of legality keeps it from containing
conditions required by statute.
3. Members of County Court who voted to
accept bond might be liable if damages ac-
crued as a result of its insufficiency.

March 11, 1948.

FILED

3/16
84

Honorable Edw. W. Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

This will acknowledge your recent letter in which
you request an opinion of this department. Your letter is
as follows:

"A member of the County Court of Chariton
County, Missouri, has requested that I ob-
tain an opinion from your office concern-
ing the following proposition:

"Section 8656, Missouri Revised Statutes,
1939, provides that the County Highway
Engineer shall provide a bond conditioned
on the performance and matters of things
therein stated.

"There is included herewith a copy of the
bond of the County Highway Engineer of this
county, which bond was accepted by two of
the three members of the County Court over
the objection of the third member. The ob-
jection of the third member being that the
bond is improper and insufficient, partic-
ularly because the amount is only \$1000.00,
while the value of property that will be
placed in the engineer's custody will amount
to about \$8000.00, and also, because of the
clause included in the bond which provides
that the engineer or his bondmen shall not
be liable for any loss suffered because of
the theft of any of the county property in
his custody by others than himself. The mem-
ber of the County Court objecting to the bond
feels that the bond, if not worthless in its
present form, is insufficient and does not
comply with the law. He further desires to
know what the personal liability of the mem-

bers of the County Court would be in the event county property in the custody of the engineer was stolen, by their acceptance of this bond.

"Your opinion will be greatly appreciated on this matter."

You have submitted with your letter the bond approved by two judges of the county court, as to the sufficiency of which your inquiry pertains.

Section 8656, R. S. Mo. 1939, which is the section requiring the county highway engineer to furnish a bond, is as follows:

"Before entering upon the performance of his duties, the county highway engineer and his assistants shall each execute and deliver to the county court a bond in such sum as may be fixed by the court, with two or more sufficient securities, or the bond of a surety company authorized to do business in this state, to be approved by the court, conditioned for the faithful discharge of his duties as such highway engineer; and that he will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the county and road districts thereof."

We direct your attention to the fact that the above-quoted statute makes no requirement as to the amount of the bond required, and by failing to do so necessarily leaves the matter of the amount to be required entirely within the discretion of the county court.

We are of the opinion that, in view of the fact that the statute left the matter of the amount of the bond within the discretion of the court and of the further fact that a majority of the court approved a bond in the amount of \$1000.00, the bond cannot be held to be illegal on any theory as to the insufficiency of the amount specified therein.

The second question involved in your inquiry is whether or not the bond is insufficient under the statute, because of the following provision thereof: "Said engineer not to be re-

sponsible for loss of county property due to theft by others." With reference to this question we contend that we do not believe that this provision should be in the bond, for the reason that the county highway engineer would not be liable for losses sustained by reason of theft by others, unless said theft was contributed to by his own negligence, and that, therefore, he needs no protection from such non-existent liability, and for the further reason that any liability of the engineer growing out of theft by others, contributed to by his own negligence or carelessness, is within the intendment of the statute requiring the bond, and the bond should afford protection against any loss arising therefrom.

The third question involved in your inquiry is whether or not since the county court, by permitting the incorporation of the above-quoted provision in the bond which it has accepted, has failed to require such a bond as affords the full measure of protection required by the statute, the members of the court would be liable for loss sustained by the theft of county property involved by persons other than the engineer.

Our first comment, with reference to this last-mentioned question, is that there certainly can be no liability on the part of any judge of the county court who dissented from and voted against the acceptance of such a bond, because negligence on his part could not be established. Whether the judges, who voted for the acceptance of a bond which did not contain all of the conditions required by the statute for the protection of the county property, would be liable, personally, for loss sustained by the county as a result of the failure of the bond accepted to contain such conditions and provisions so required by the statute, depends upon the question as to whether the act of the county court in accepting such insufficient bond was a judicial or a ministerial act. If it was a judicial act, the judges would not be liable in any event; but if it was a ministerial act, we are of the opinion that the judges who voted for the acceptance of the insufficient bond would be liable in the event of loss to the county, resulting from the failure of the bond accepted by them to contain the conditions and provisions required by the statute.

It has been held by the Supreme Court of Missouri:

"* * * No action could be brought against a judge for any judgment rendered by him in his judicial character.* * *" (Stone et al Graves, 8 Mo. 148, 1.c. 151.)

It was further held, however, in the same opinion as follows:

"This principle is not to be understood as extending to ministerial acts required to be performed by an officer whose functions may be sometimes judicial. Some of the duties of the justices are judicial and some ministerial, and when he acts ministerially, or is requested to do a ministerial act for error and misconduct, he is responsible in like manner and to the same extent as all other ministerial officers. The distinction is between judicial and ministerial acts."

We are of the opinion that the acceptance by the court of the bond, a copy of which is submitted for our examination, and which contains a provision against the liability of the engineer for damages resulting from the loss of property, by theft by others, amounts to the failure and neglect on the part of the court to perform the ministerial duty prescribed by the aforesaid section of the statutes of requiring a bond from the highway engineer " * * * conditioned * * that he will account for and deliver to his successor in office, at the expiration of his term of office, all tools, machinery, books, papers and other property belonging to the county and road districts thereof."

Article 6, Section 7 of the present Constitution of Missouri, provides as follows:

"In each county * * there shall be elected a county court of three members which shall manage all county business as prescribed by law * * *."

We are of the opinion that under the foregoing constitutional provision most of the duties growing out of the management of the county business, for the performance of which function the county court exists, are purely ministerial.

We believe that the requirement of such a bond by the court is a ministerial rather than a judicial duty, for the reason that the specification of the character of the bond required is so plain and unmistakable as not to require judicial interpretation. Therefore, if the court accepts a bond which does not fulfill the requirements of the statute, it has thereby failed to perform a ministerial duty imposed upon it by statute, and the members who voted for that course of action would

be civilly liable if damages should result from such failure.

CONCLUSION.

We are, therefore, of the opinion that,

1. In view of the fact that the statute empowers the county court to fix the amount of the bond, the \$1000.00 submitted cannot be said to be insufficient in amount.


2. In view of the fact that the statute requires a bond to be furnished by the highway engineer, conditioned for the delivery of all property in his custody to his successor in office at the expiration of his term, the presence of a provision in the bond exempting the engineer from responsibility for the loss of such property, as a result of theft by others, is such a limitation of the aforesaid condition required by the statute as to render the bond insufficient.

3. In view of the fact that the failure by the county court to require a sufficient bond is the failure to perform a ministerial duty, those members of the court who voted for the acceptance of such insufficient bond would be secondarily liable for any loss accruing to the county as a result of the insufficiency of the bond.

Respectfully submitted,

SAMUEL M. WATSON,
Assistant Attorney-General

APPROVED:

J. E. TAYLOR 
Attorney-General.

SMW/LD

ELECTION: County committee may nominate candidate for county judge to fill vacancy caused by death of incumbent subsequent to primary.

September 11, 1948

FILED

84

9-13

Honorable Edward Speiser
Prosecuting Attorney
Chariton County
Keytesville, Missouri

Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"Our Presiding Judge of the County Court died September 6th. His term of office expires Jan. 1, 1951. He was elected on the Democratic ticket in 1946. It would appear that under Sections 2477 and 11509, MRSA that the Governor appoints his successor to serve for a term ending the first Monday in January in 1949. Under Sections 11538 and 11562 MRSA the Democratic Central Committee for Chariton County is given certain authority to fill vacancies on the ticket created by death of a nominee of the Party. In State ex inf., Barrett vs. McClure, 299 Mo. page 688, the Supreme Court ruling therein made seems to authorize the County Central Committee to select a candidate for the office to serve that portion of the unexpired term commencing the first Monday in January, 1949.

"I would like to have your opinion setting forth the exact procedure to be followed to insure the valid election in November of a successor to the Governor's appointee. Also I would like to know if other political parties can place the name of a candidate of their choice on their ticket for submission to the voters at the general election in November."

Section 11562, Mo. R.S.A. provides that vacancies occurring after the holding of any primary and resulting from death or

resignation of the nominee of a party at such primary, shall be filled by the party committee of the district, county or state, as the case may be.

Section 11538, Mo. R.S.A. likewise provides for filling of vacancies by the central committee of the district in which the vacancy occurs.

Section 11509, Mo. R.S.A. contains the following provision:

"Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any state or county office originally filled by election by the people, other than the office of lieutenant-governor, state senator, representative, sheriff or coroner, such vacancy shall be filled by appointment by the governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election--at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next following said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold such office until such other date."

In the case of State ex inf. Barrett vs. McClure, 299 Mo. 688, the court held that where a vacancy occurred after the primary election by reason of the death of an officer, in that case the county treasurer, whose term would not expire in January following the general election, a vacancy existed for which nomination might be made by the county committee under the provisions of what is now Section 11562, Mo. R.S.A. This case is, we believe, authority for action on the part of the county committees in Chariton county in nominating candidates whose names should be placed on the ballot in November as candidates for the unexpired term of presiding judge of the county court. Both the Republican and Democratic parties are, of course, entitled to nominate candidates in this manner. A

meeting of the committee should be called and thereafter a certificate of nomination executed in accordance with Section 11525, Mo. R.S.A. and Section 11533, Mo. R.S.A. and filed with the county clerk. No time is specified for filing of such certificate but it should be done as promptly as possible.

CONCLUSION

This department is of the opinion that a vacancy in the office of presiding judge of the county court whose term expires January 1, 1951, which occurred by reason of the death of the incumbent subsequent to the primary election, should be filled at the general election in November and candidates for the unexpired term should be nominated by the central committee of the respective parties.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

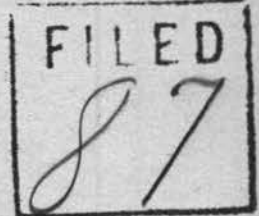
APPROVED:

J. E. TAYLOR *JET*
Attorney General

RRW:mw

ELECTION: Judges and precinct judges and clerks in St. Louis City, who worked past midnight on date of August primary, are not entitled to extra day's pay therefor, but are limited to pay for days mentioned in Article 24, Chapter 76, Mo. R.S.A.

September 20, 1948



9-24

Mr. Arthur M. Sullivan
Chief Clerk
Board of Election Commissioners
City of St. Louis
208 South 12th Boulevard
St. Louis 2, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department and reading as follows:

"Today's news dispatches state that an opinion was handed down by your office that Judges and Clerks of St. Louis County who served at the Primary Election August 3, 1948, and worked past midnight, were entitled to two days pay. The Board requests your advice as to whether the opinion given to the Board of Election Commissioners of St. Louis County is applicable to Judges and Clerks employed by the Board of Election Commissioners of the City of St. Louis."

Section 12276, Laws of Missouri, 1947, page 279, provides in part as follows:

" * * * Precinct judges and clerks shall each receive as pay six (\$6.00) dollars for each day or part of day while on duty, except pay shall be allowed only for those days mentioned in this act."

There are found in the act referred to--that is, Article 24, Chapter 76, Mo. R.S.A.--a great many "days" mentioned.

Section 12199, R. S. Mo. 1939, provides in part as follows:

" * * * Said judges and clerks shall be appointed for a term ending sixty days prior to the next presidential election after the election at which they were appointed to serve, and shall, during

said term, serve as judges and clerks at all special, local, municipal, primary and general elections. The board shall have the power on any day of election, * * * "

Sections 12213 and 12214, R. S. Mo. 1939, provide for the verification lists for each precinct, and provide that at such time as the board of election commissioners may direct that the two clerks of the election of opposite politics shall canvass each precinct and shall continue such canvass until it has been completed.

Section 12222, Laws of Missouri, 1943, page 546, provides in part as follows:

" * * * Any person who shall wilfully or negligently destroy, tear down, deface, remove or otherwise injure a posted list of registered voters, prior to the day of the election for which it is posted, * * * "

Section 12227, R. S. Mo. 1939, provides in part as follows:

"The days upon which the general, state, county or primary elections shall hereafter be held in such city shall be legal holidays, * * * "

Section 12230, R. S. Mo. 1939, provides that the judges of election in each precinct shall on the day preceding any election call at the board of election commissioners and receive the precinct register and the key given to the judge who did not receive the register, and that the ballot boxes of each precinct shall be delivered to the one judge and the key or keys be given to the judge of the opposite political party.

Section 12231, R. S. Mo. 1939, provides in part as follows:

" * * * After the polls close the said clerks shall see that the roll call is properly filled out by the judges and clerks who actually served in that precinct on that day. * * * "

Section 12232, R. S. Mo. 1939, provides in part as follows:

" * * * Any judge or clerk who shall willfully absent himself from the polls on election day, without good cause, shall be guilty of a misdemeanor, and be subject to a fine or penalty of not to exceed five hundred dollars. * * * "

Section 12235, R. S. Mo. 1939, provides in part as follows:

"The qualified elector, on the day of election, * * * "

Section 12244, Laws of Missouri, 1943, page 546, provides in part as follows:

" * * * Each of the statements shall contain a caption stating the day on which, and the number of the election precinct and the ward, city and county in relation to which such statement shall be made, and the time of opening and closing of the polls of such precinct. * * * "

Section 12269, R. S. Mo. 1939, provides in part as follows:

"If any judge of election in any election precinct shall, without urgent necessity, absent himself from the polls of said precinct, upon any day of election, * * * "

As is shown from the above statutory provisions found in Article 24, Chapter 76, Mo. R.S.A., the days for which the precinct election judges and clerks are to be paid are clearly set forth. It is our opinion, therefore, that under the wording of Section 12276, Laws of Missouri, 1947, page 279, those precinct election judges and clerks of St. Louis City, who did, as a matter of fact, perform services after midnight of the August primary election day of 1948, are not entitled to an additional day's pay for the services performed after midnight of election day.

We believe that the reference in said Section 12276 to "part of day" refers to the payment to be made to the election clerks for their services on the last day of canvassing under provisions of Section 12214, R. S. Mo. 1939, whether or not a full working day is required on such last day of canvass and the payment to be made to the judges of election for their

Mr. Arthur M. Sullivan

-4-

duties in obtaining and taking care of the precinct registers, the ballot boxes and the keys thereto on the day preceding the day of election.

CONCLUSION

It is the opinion of this department that the precinct judges and clerks, who, as a matter of fact, performed official duties after midnight of the date of the August primary, are not entitled to an additional day's compensation therefor.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *J. E.*

CBB:VLM

CORONERS: Coroner of St. Louis City elected November 2, 1948, takes office January 1, 1949. Bond in amount of \$10,000.00 must be given by said Coroner within 20 days after election.

November 12, 1948

FILED

88

Mr. Patrick E. Taylor
Coroners' Court
1300 Clark Avenue
St. Louis, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting an official opinion of this department, reading as follows:

"It has been the custom in the past for the Coroner-elect to take office twenty days after the general election, which would be November 22, 1948. However, after examining the Laws of 1945, loc. cit. page 1405, Section 2, I find that:

"Each coroner shall enter upon the duties of his office on the first day of January next after his election."

"Sections 13228 and 13229, R. S. Missouri 1939, require the Coroner to take oath and give bond in the sum of one thousand dollars. Section 179 of the Revised Code or General Ordinances of the City of St. Louis, 1926, Chapter 9, Sec. 179 requires that he give bond in the sum of ten thousand dollars. Section 13230 R. S. Missouri 1939 states that

"If a coroner neglects to give bond within twenty days after his election, or shall fail to give bond when required under the preceding section, his office shall be deemed vacant."

"Query: 1. Is Section 13230 repealed by implication or does the Coroner-elect have to furnish bond within twenty days? If within twenty days, for what period shall he secure the State and in what amount?

"2. Does the Coroner take office on January 1, 1948, or does he take office twenty days after election?"

Section 2, Laws of Missouri, 1945, page 1405, the relevant part of which you have quoted in your opinion request, is applicable to the City of St. Louis, and under the provision of such section, the duties of the office of coroner, for which the election was held November 2, 1948, are to be assumed on January 1, 1949.

Section 13228, R. S. Mo. 1939, provides that coroners, before they enter upon the duties of their office, shall give a bond in the penalty of at least \$1,000.00. Section 179, found in Chapter 9 of the Revised Code of St. Louis City, provides that the bond of the Coroner of St. Louis shall be \$10,000.00. We believe that such requirement is a valid one and is not in conflict with the state law--that is, Section 13228--since the state law requires only a minimum of \$1,000.00 for the bond.

Section 13230, R. S. Mo. 1939, provides that if the coroner neglects to give bond and qualify within 20 days after his election, his office shall be deemed vacant. We do not believe that Section 13230 is inconsistent with Section 2, Laws of Missouri, 1945, page 1405, since the giving of the bond is a condition precedent to the assumption of the office and does not determine the date at which the duties of the office are to be assumed. However, since Section 2, Laws of Missouri, 1945, page 1405, provides that the duties of the office shall be assumed by the person elected on January 1, following his election, the bond should cover the period beginning January 1, 1949, and remaining in full force and effect until the end of the term of office for which the candidate was elected.

CONCLUSION

It is the opinion of this department that the coroner elected for St. Louis City November 2, 1948, must furnish a \$10,000.00 bond within 20 days after such date and that such bond shall be in full force and effect from January 1, 1949, until the end of the term of office for which the coroner was elected. It is further the opinion of this department that such coroner takes office January 1, 1949.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

C. B. BURNS, JR.
Assistant Attorney General

CBB:VLM

- MAGISTRATE COURTS: Cost of making out transcript of record
CHANGE OF VENUE: in change of venue to be charged after
such change of venue.

March 3, 1948

FILED

89

2/3

Honorable Frank W. Tirrell
Judge of the Magistrate Court
Third District, St. Louis County
Maplewood, Missouri

Dear Judge Tirrell:

This will acknowledge receipt of your letter requesting
an opinion from this department, which reads as follows:

"We would like to have you give us an
opinion as to whether or not the Tran-
script Fees on a 'Change of Venue' are
collectible at the time the application
is presented. This is covered by Sec-
tion 77, Senate Bill 207, of the 63rd
General Assembly, in which it states:
'that all original papers and transcript
shall be sent to the Magistrate in whose
Court it is to be set.'

"In Senate Bill 333 of the 63rd General
Assembly, Section 1, lines 13-14-15, it
states: that fees, for copies, records,
pleadings and instruments on file in the
Court, shall be collected for this ser-
vice.

"We have been charging for the transcript
at the time application was filed, but it
has been challenged, and the Attorney
states it does not specify regarding the
payment in Section 77. In looking into
the revised statutes of 1939, Section 1067,
it states: that the cost of transcript
shall be charged to petitioner and shall
not be taxed to the costs. And, in Sec-
tion 1058 of the same, it states: that
this section would be applicable to Courts
of Record. Therefore, would these sections
cover Magistrate Courts in this instance?"

The provisions of the law regarding change of venue in civil cases in the magistrate courts are found in the Laws of Missouri, 1945, page 765, Sections 76 through 80.

The precise question presented is whether the transcript fees which accrue in the changing of venue from one magistrate court to another or to the circuit court may be charged and collected at the time the application for such change of venue is filed.

It is provided that when the affidavit is filed requesting change of venue the magistrate must allow the change of venue and enter an order accordingly and immediately transmit all of the original papers and a transcript of all of his orders in the case to some competent magistrate or circuit court. If the order is made, it is mandatory that said transcript of the record, together with the original papers, be transmitted to the proper magistrate or circuit court. *Patterson v. Yancey*, 97 Mo. App. 681, 1.c. 697.

For all practical purposes, it will be the clerk of the magistrate court who makes out said transcript of the record. This is indicated by Section 1065, R.S. Mo. 1939, which requires the clerk of the court to make out a full transcript of the record and proceeding in the cause. Said statute is penal in nature, providing a penalty if the clerk fails to so perform. *Randol v. Garoutte*, 78 Mo. App. 609.

The responsibility for costs in a change of venue is specifically set out in Section 80. However, no mention is made as to when said costs, and particularly the transcript fees, should be charged and paid. Since it is mandatory for the transcript of the record to be immediately made up and transmitted to the proper court, this duty must be performed without primary regard for the immediate payment of the transcript fees.

Section 1068, R.S. Mo. 1939, provides that if the costs and expenses incurred in a change of venue are not paid within fifteen days after such change of venue, the clerk may make out a fee bill which may be collected by the sheriff. It is further provided by Section 1069, R.S. Mo. 1939, that the clerk may recover the amount of such fee bill by civil action. Said sections refer to courts of record and, we believe, are applicable to magistrate courts which are, of course, courts of record. Therefore, it is clear that said transcript fees are not required to be charged and paid at the time of application for change of venue but must be paid within fifteen days after such change of venue.

Honorable Frank W. Tirrell

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It is quite evident that there is no liability for the cost or expense of making out a transcript of the record in such proceeding until after such service has been rendered. Further, it is difficult to understand how the actual cost of such transcript of the record could be adequately computed before the same was completed.

Your attention is directed to the Laws of Missouri, 1945, page 488, which is the controlling law concerning fees which may be charged for certain services of the clerk of the magistrate court.

Conclusion.

The cost incurred in making out a transcript of the record in a change of venue proceeding in a civil case in the magistrate court should not be charged until after such change of venue.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General *983*

DD:ml

OFFICERS:
FEES:
PROSECUTING
ATTORNEYS:

Prosecuting attorney is not entitled to fee for preparing transcript of bond issue voted for bridge improvement by county.

FILED

89

March 26, 1948

3.29

Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Sir:

This is in reply to your letter of recent date, requesting an official opinion of this department and reading as follows:

"I wish your official opinion on the following proposition:

"Can the Prosecuting Attorney of a County under Township organization and the County Court of such County enter into a contract whereby the Prosecuting Attorney shall be paid a designated fee for preparing the transcript of the bond issue covering bridge improvement bonds approved by more than two-thirds of the legal voters in said County, voting upon said bond issue?

"I am Prosecuting Attorney of Carroll County. On March 23rd, 1948, more than two-thirds of the qualified voters, voting at an election held for that purpose voted in favor of the issuance of \$100,000.00 in bonds to be issued by Carroll County for the construction and reconstruction of County bridges. The election was held pursuant to the provisions of Article V, Chapter 16, R. S. Mo. as repealed and re-enacted by the Laws of Missouri, 1945, page 598 et seq and Section 8686, et seq of Article 6, Chapter 16, Revised Statutes of Missouri, 1939, as repealed and re-enacted under Section 8606 Laws Missouri, 1945.

"May I as Prosecuting Attorney contract with the County Court for a fee for the preparation

of the transcript of the proceedings showing the legality of the bond issue?"

Section 12944, R. S. Mo. 1939, referring to the duties of the prosecuting attorney, provides, in part, as follows:

"He shall * * * represent generally the county in all matters of law, * * *."

Since it is necessary that the validity of the election authorizing the issuance of the bonds be determined before such bonds can be issued and negotiated, we believe that the above quoted portion of Section 12944 places upon the prosecuting attorney of the county the official duty of preparing the transcript of the proceedings authorizing the issuance of such bonds.

In the case of State ex rel. v. Affolder, 214 Mo. App. 500, the Springfield Court of Appeals held that it was not the official duty of the prosecuting attorney to look after the legal phases of a bond issue voted for road purposes by Duck Creek Township, in Stoddard County. The court said, l. c. 505:

"Was it the duty of the prosecuting attorney to render the services which plaintiffs rendered? Sections 736 and 738 prescribe generally the duties of the prosecuting attorney. There is nothing in these sections which may be said to place upon the prosecuting attorney the duty of looking after this bond issue. There are other sections prescribing duties in particular cases, but the sections, supra, cover the fields generally. The bond issue of Duck Creek township was not a matter of county wide concern. It was a matter that affected that township only. * * *"

The court further said, l. c. 506:

"* * * Since there is no statute directing generally that the prosecuting attorney shall act for the township in counties under township organization, it is our conclusion that it was not the official duty of the prosecuting attorney to render the services which plaintiffs rendered."

Section 12944, supra, does place upon the prosecuting attorney the duty of acting for the county, and we believe that the

holding in the Affolder case, supra, is authority for holding that it is the official duty of the prosecuting attorney of the county to handle the legal phases of a county bond issue.

It is a well established principle of law that a public officer shall not be paid any additional compensation for the performance of his official duties unless a statute specifically provides for such additional payment for the performance of such duties. The Supreme Court of Missouri, in the case of Nodaway County v. Kidder, 129 S. W. (2d) 857, 1. c. 860, said:

"It is well established that a public officer claiming compensation for official duties performed must point out the statute authorizing such payment. State ex rel. Buder v. Hackmann, 305 Mo. 342, 265 S. W. 532, 534; State ex rel. Linn County v. Adams, 172 Mo. 1, 72 S. W. 655; Williams v. Chariton County, 85 Mo. 645.

"The duties performed by appellant, and for which the additional fee or salary and mileage was paid, were with reference to matters pertaining to and relating to his official duties as presiding judge of the county court and said services were within the scope of said official duties. The work in which appellant was engaged was directly under the supervision of the county court. Public policy requires that a public officer be denied additional compensation for performing official duties."

CONCLUSION

It is the opinion of this department that a prosecuting attorney has, as part of his official duties, the duty of handling the legal phases of an election at which the county votes road bonds, and he has the duty of handling the legal work necessary to the issuance of such bonds.

It is further the opinion of this department that a prosecuting attorney has no authority to enter into a contract with

Honorable D. D. Thomas, Jr.

-4-

the county court whereby the prosecuting attorney is to be paid for preparing the transcript of a bond issue covering bridge improvement bonds of a county.

Respectfully submitted,

C. B. BURNS, Jr.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

J. E. T.

CBB:HR

C. 22-2
Blaw
LIQUOR CONTROL: A licensee, convicted in a magistrate court of selling nonintoxicating beer to a minor, who files his appeal to the circuit court, has no right to operate during the time the appeal is pending, as such conviction has revoked his license as of the date of said conviction.

April 14, 1948

FILED

89

H-15
Honorable B. C. Tomlinson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Your opinion request of recent date reads as follows:

"By the provisions of Section 4974, Revised Statutes of Missouri, 1939, it is provided that if a person is convicted of a violation of the Liquor Control Statute, his license is automatically revoked and it is further provided in said section as follows: 'If the permittee or licensee charged in such proceeding with such violation, he by final judgment therein, acquitted of said charge, he may apply for and receive a license pursuant to this article upon paying therefor the license fee in this article required, and by otherwise conforming to all requirements as to such applicants, and with the same right as though he had never held a license under the provisions of this article.'

"If a licensee is convicted of selling nonintoxicating beer to a minor in Magistrate Court and files his appeal to the Circuit Court, during the time that the appeal is pending, does the licensee have the right to operate or shall his license be revoked?"

Your question as to whether or not an appeal to an appellate court from a conviction in a magistrate court of a person holding a nonintoxicating beer license acts as a supersedeas or stay of the judgment is answered by Section 4974, R.S. Mo. 1939. Therein, in part, it provides:

"* * * If the person so convicted shall be the holder of any permit or license issued pursuant to the provisions of this article, such conviction by any court of competent jurisdiction shall, without further proceeding, action or order by any court or by the Supervisor of Liquor Control, operate to revoke and forfeit as of the date of such conviction such permit and all rights and privileges granted thereby, and the holder of such permit shall not thereafter, for a period of one year after the date of such conviction, be entitled to any permit for any person authorized in this act. If the permittee or licensee charged in such proceeding with such violation, be, by final judgment therein, acquitted of said charge, he may apply for and receive a license pursuant to this article upon paying therefor the license fee in this article required, and by otherwise conforming to all requirements as to such applicants, and with the same right as though he had never held a license under the provisions of this article." (Under-scoring ours.)

As you can see, there is no specific provision denoting an appeal is to supersede or stay the judgment of a lower court. The underlined portion above plainly states that on conviction of a violation of any provision of the nonintoxicating beer laws of the State of Missouri, such conviction acts from the date of said conviction to revoke and forfeit all rights and privileges granted by any license held under the provision of said act.

This attitude is consistent throughout the entire Liquor Control Act. Section 4905b, Laws of Missouri 1945, providing for the review of decisions of the Supervisor of Liquor Control, states specifically that, in the event of an appeal from the decision of the Supervisor of Liquor Control, said appeal does not stay the enforcement of the Supervisor's decision. Section 4946a, R.S. Mo. 1939, providing that the sheriff or any peace officer or eight or more citizens may bring charges against a

licensee for the violation of the Liquor Control Act, likewise specifically provides that the judgment of the court on said charges shall in no event be superseded or stayed during the pendency of any appeal from said judgment. Section 4996a, Laws of Mo., 1943, contains the same provision as is found in Section 4946a, supra, to-wit:

"* * * Such certification by the Supervisor shall not act as a supersedeas of any order made by him.

* * * * *

"The judgment of the Court in no event shall be superseded or stayed during pendency of any appeal therefrom."

We believe it to be obvious that the intent of the Legislature, in so implementing the Liquor Control Act of Missouri, is that an appeal either from the decision of the Supervisor of Liquor Control or from a conviction in a court of competent jurisdiction to a higher court does not act as a supersedeas or stay the judgment during the pendency of such appeal.

CONCLUSION

A licensee, convicted in a magistrate court of selling nonintoxicating beer to a minor, who files his appeal to the circuit court, has no right to operate during the time the appeal is pending, as such conviction has revoked his license as of the date of said conviction.

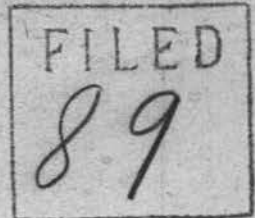
Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JTB*
Attorney General

WCB:LR



April 20, 1948

Hammitt
Honorable D. D. Thomas, Jr.
Prosecuting Attorney
Carroll County
Carrollton, Missouri

4-21
Dear Mr. Thomas:

We are in receipt of your request for an opinion. Restating your request, for sake of brevity, you inform us that the County Court recently voted \$100,000.00 in bonds for construction, re-construction and repairment of public bridges in your county under Section 8606, page 1478, Laws of Missouri, 1945, and Section 3300, page 600, Laws of Missouri, 1945, and you inquire:

1) If the County Court may direct the County Treasurer to sell the bonds at private sale, at not less than their face value, without first causing the County Treasurer to advertise the sale of such bonds at public sale.

2) May the County Treasurer reject all bids submitted under advertisement, at the direction of the County Court and thereupon sell such bonds at private sale, upon order of the County Court, even though the person or corporation to whom said bonds might be sold at private sale does not offer a bid or does not make a bid, which, as a matter of fact, is the lowest bid.

Section 8608, page 1478, Laws of Missouri, 1945, authorizes a County Court to issue bonds for construction, re-construction, improvement, maintenance and repairs of public roads, highways, bridges and culverts in an amount provided by law. Said Section 8608, reads as follows:

"The county courts of the counties of this state are hereby authorized to issue bonds for and on behalf of their

respective counties for the construction, reconstruction, improvement, maintenance and repair of any and all public roads, highways, bridges and culverts within such county, including the payment of any cost, judgment and expense for property, or rights in property, acquired by purchase or eminent domain, as may be provided by law, in such amount and such manner as may be provided by the general law authorizing the issuance of bonds by counties. The proceeds of all bonds issued under the provisions of this section shall be paid into the county treasury where they shall be kept as a separate fund to be known as the 'Road Bond Construction Fund' and such proceeds shall be used only for the purpose mentioned herein. Such funds may be used in the construction, reconstruction, improvement, maintenance and repair of any street, avenue, road or alley in any incorporated city, town or village if such street, avenue, road or alley or any part thereof shall form a part of a continuous road, highway, bridge or culvert of said county leading into or through such city, town or village."

The 63rd General Assembly also repealed Section 3300, R.S. Mo. 1939, and enacted Section 3300, page 600, Laws of Missouri, 1945, in lieu thereof, which prescribes the procedure for selling said bonds, and reads, in part:

"The county treasurer of the county issuing such bonds is hereby authorized to sell and dispose of all such bonds in the manner hereinafter provided. Said treasurer, under the direction of the county court, shall cause notice to be published once per week for two consecutive weeks in one or more newspapers of general circulation published in such county, or, if there is no newspaper published in such county, then by posting written or printed handbills in at least two public places in the county, that sealed proposals for the purchase of all or a part of said bonds as may appear

in said notice will be received at his office, and that the same will be opened by him in the presence of the county court on the day and hour mentioned in the notice. Said treasurer may, under the direction of the court, reject any or all bids that the court may not deem satisfactory as to price or otherwise, and in case of rejection, he may again advertise and sell said bonds in the same manner; provided, however, if the county court shall so order the treasurer may sell said bonds at not less than their face value, at private sale, and report the same to the court at the next term thereafter. * * *

There are two well established rules of statutory construction to keep in mind in rendering this opinion. One of the cardinal rules of construction is to ascertain, if possible, from words used, the legislative intent in enacting a statute, and give it that effect. (See: Donnelly Garment Company vs. Keitel et al., 193 S.W. (2d) 577, 354 Mo. 1138. Also, Wentz vs. Price Candy Company, 175 S.W. (2d) 852, 352 Mo. 1.) It has also been held that under certain circumstances, a proviso in an Act should be construed with reference to the subject-matter of the sentences of which it forms a part. In United States vs. Bernays, 158 Fed. Rep. 792, 1.c. 795, 86 C.C.A. 52, the Court said:

"* * * This conclusion is in harmony with the general rule that a proviso should be construed with reference to the subject-matter of the sentence of which it forms a part unless it clearly appears to be designed by the Legislature for a broader or more independent operation. Suth. Stat. Const. Sec. 223; Savings Bank v. United States, 19 Wall. 227, 236, 22 L. Ed. 80; Boston Safe Deposit & Trust Co. v. Hudson, 68 Fed. 758, 15 C.C.A. 651. * * *"

Looking to the wording of Section 3300, supra, we find the first and second sentences provide that the County Treasurer shall, under direction of the County Court, give

notice in the county by publishing in a newspaper of general circulation, or if there be no newspapers that can meet the necessary requirements, then by posting a notice, that sealed proposals for purchase of all or a part of the bonds will be received in his office, and said proposals will be opened on the date mentioned, before the County Court. The third sentence in said Section seems to be the one in question, and authorizes the County Treasurer, under the direction of the County Court to reject any and all bids that the Court may not deem satisfactory as to price or otherwise, and if said bid, or bids, are rejected, the County Treasurer may advertise and sell bonds in the same manner, which refers to the manner of sale mentioned in the first and second sentences. It will be noticed that in second sentence of said Section, the General Assembly used the word "shall" when referring to advertising the sale of bonds, which clearly makes it mandatory upon the County Treasurer to advertise the sale of said bonds. However, it will be further noticed, that the General Assembly in drafting the third sentence of said Section used the word "may", with regard to advertising and selling said bonds in case the first bids are rejected, which indicates that the matter is left to the discretion of the County Treasurer. In State vs. Wymore, 119 S.W. (2d) 941, 1.c. 944, 343 Mo. 98, the Court said:

"Respondent argues that the remedy provided by this statute is an exclusive remedy against respondent for misconduct. On reading the article it will be noted that the words 'may' and 'shall' are used many times in the several sections. They were used advisedly and must be given their usual and ordinary meaning. It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory. * * *".

(See also: Lansdown vs. Paris, 66 F. (2) 939).

Considering that the Legislature used the word "may" instead of "shall" in the third sentence, relative to the method of advertising for the sale of bonds upon rejection of former bids, along with the rule of statutory construction hereinabove announced in United States vs. Bernays, supra,

Honorable D. D. Thomas, Jr. -5-

that provisos should be construed with reference to the subject-matter of the Section of which it forms a part, furthermore, that said proviso in question is a part of the third sentence, and authorizes the County Treasurer, when ordered by the County Court, to sell said bonds at not less than their face value at private sale, clearly indicates to us that the legislative intent was that said bonds should first be advertised as indicated in the first and second sentences of Section 3300, supra, and in case the bid, or bids, are properly rejected, then the County Treasurer may again advertise in the same manner, or if the County Court shall order, he may, in lieu of the advertisement a second time, sell said bonds at not less than their face value at a private sale, as provided in the third sentence of said Section.

CONCLUSION

Therefore, it is the opinion of this Department in answer to your first question:

The County Court cannot in the first instance, prior to any bids being rejected, direct the County Treasurer to sell bonds at private sale at not less than the face value of said bonds; that the notice of sale must first be published in accordance with the second sentence of Section 3300, supra.

In answer to your second question:

If the County Court shall reject the bids on the grounds provided in Section 3300, supra, and the County Court shall so order, the County Treasurer may then sell the bonds at private sale at not less than their face value.

Respectfully submitted,

APPROVED:

AUBREY R. HAMMETT, Jr.
Assistant Attorney General

J. E. TAYLOR
Attorney General

ARR:lr

JTB

SHERIFF:

ELECTIONS:

For a person to be eligible for the office of sheriff in the State of Mo., pursuant to Sec. 13125, supra, the eligibility of said person must be demonstrable at the time of the commencement of the term of office and of the taking possession of the office. The term "resident taxpayer" means one must have paid or be subject to taxes on either real property, personal property, or intangible personal property and at least a portion of said taxes must go to the local government in the place in which the taxpayer resides.

May 12, 1948

FILED

89

Honorable B. C. Tomlinson
Prosecuting Attorney
Farmington, Missouri

Dear Mr. Tomlinson:

This will acknowledge receipt of your request for an official opinion, which request reads as follows:

"House Bill 683, Laws of Missouri, 1945, repealed Section 13125 Revised Statutes of Missouri, 1939, and enacted in lieu thereof a new Section 13125 providing qualifications for the office of Sheriff; a portion of said section reads as follows:

"Such person shall be a resident taxpayer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement."

"Does this section require a candidate for Sheriff to be a resident taxpayer at the time he files his declaration as a candidate for said office or does it mean that he must be a resident taxpayer at the time he qualifies for said office providing he is elected to same? And does the term 'resident taxpayer' mean one must have paid taxes to the state and county on either real property or tangible personal property?

"I would appreciate receiving an opinion from you at your earliest opportunity."

Honorable B. C. Tomlinson -2-

Your opinion request relates to a construction of Section 13125, Laws of Missouri, 1945, page 67, Cumulative Pocket Part, R.S.A.

Said Section provides as follows:

"At the general election to be held in 1948, and at each general election held every four years thereafter, the qualified voters in every county in this state shall elect some suitable person sheriff. No person shall be eligible for the office of sheriff who has been convicted of a felony. Such person shall be a resident tax payer and elector of said county, shall have resided in said county for more than one whole year next before filing for said office and shall be a person capable of efficient law enforcement. When any person shall be elected sheriff, the clerk of the county court shall deliver to him a certificate of his election, under the seal of the court, and shall also certify that fact to the clerk of the circuit court, who shall file the certificate in his office; and he shall enter upon the discharge of the duties of his office on the first day of January next succeeding his election."

This statute sets up the qualifications which determine the eligibility of a person for the office of sheriff. In answer to your question as to whether a candidate for sheriff must be a resident taxpayer at the time he files his declaration as a candidate for said office, or must be a resident taxpayer at the time he qualifies for said office, we refer you to the case of State ex inf. Mitchell, Pros. Atty., ex rel. Goodman vs. Heath, 132 S.W. (2d) 1001, 1.c. 1005, where the Court in construing the term "eligible" held as follows:

"It was contended that 'the word "eligible", as used in Constitutions and statutes, concerning elections to office, means the capacity to hold the office at the time of the election, so that the subsequent removal of the disability will not remove the incompetency.' While there are two conflicting lines

of authorities on this question in this country, this court held against this contention and decided that the Constitution and statute did not mean eligible at the time of election, but, instead, meant eligible at the time of commencement of the term and of taking possession of the office. See 46 C.J. 949, sec. 58; 22 R.C.L. 403, Sec. 43; 88 A.L.R. 812 note; 24 R.C.L. 571, Sec. 16. * * * "

Further support of this view is found in Corpus Juris, Volume 46, "Officers", page 938, Section 33; American Jurisprudence, Volume 42, "Public Officers", page 910, Section 39.

As to your question "does the term 'resident taxpayer' mean one must have paid taxes to the state and county on either real property or tangible personal property" we find the definition of resident taxpayer in Words and Phrases, Volume 37, page 309, where a resident taxpayer is construed to be synonymous with "qualified property taxpaying voter". Also, in the case of State ex rel. Higgs vs. Muskogee Iron Works, 103 P. 101, 187 Ok. 419, it was held that those who paid sales tax only, no part of which went to the city, were not "resident taxpayers of said city". In the Heath case, supra, cited, at l.c. 1005, the Missouri Supreme Court in defining a "resident taxpayer" held as follows:

"It is clear that, under the rule of State ex inf. Bellamy ex rel. Harris v. Menengali, supra, respondent was a resident tax payer of the district because he had paid taxes for 1935 (based on June 1, 1934, assessment) and continued to own the same taxable property in the district at all times thereafter. Even though the assessor failed to include him in his assessment of June 1, 1935, this omission did not relieve him of his obligation to pay the 1936 taxes, and these taxes could be collected by following the statutory procedure. * * *".

Previous opinions of this office, copies of which are attached hereto, define a taxpayer as one who pays any tax or is subject to the payment of a tax on property in which

Honorable B. C. Tomlinson -4-

he has an interest. While we have found no statutory or judicial authority that expressly states that a candidate for office must have paid taxes to the state or county, on either real property, personal property, or intangible personal property, we believe it to be evident from the rules cited, supra, that a "resident taxpayer" is a person who pays taxes or is subject to taxes on either real property, personal property or intangible personal property. And, further, that the term "resident" means that at least a portion of the taxes paid upon any of the above enumerated interests must go to the local government of said taxpayer's residence.

CONCLUSION.

It is the opinion of this Department that for a person to be eligible for the office of sheriff in the State of Missouri, pursuant to Section 13125, supra, the eligibility of said person must be demonstrable at the time of the commencement of the term of office and of the taking possession of the office.

Further, that the term "resident taxpayer" means one must have paid or be subject to taxes on either real property, personal property, or intangible personal property and at least a portion of said taxes must go to the local government in the place in which the taxpayer resides.

Respectfully submitted,

APPROVED:

WILLIAM C. BLAIR
Assistant Attorney General

J. E. TAYLOR
Attorney General

WCB:ir
attch: 6

MOTOR VEHICLES:

"Taxicab" owner as defined by city ordinance, not complying with municipal regulatory ordinance, is subject to Motor Vehicle Safety Responsibility Act.

September 28, 1948



Honorable B. C. Tomlinson
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office reading as follows:

"In December 1946, X was the owner and operator of a taxicab business in a city of the third class located in St. Francois County, Missouri and was then licensed by that city to conduct such business. A city ordinance was in force at that time regulating the operation of taxicabs within the corporate limits, defining a taxicab, requiring licensing fees, requiring proper brakes, lights and other equipment, and requiring the drivers of such vehicles to be licensed, and authorizing a police committee of the city council to approve or reject the issuance of a driver's permit, and other provisions.

"Section 12 of said ordinance provides as follows: 'Every owner or operator of a taxicab, as defined in this Ordinance, shall file and deposit with the American State Bank, of Flat River, at the time he obtains his license, and continue the same in full force and effect during the period of his license, cash in the sum of \$1000.00, or bonds in the equivalent of \$1000.00, as he may elect, to the credit of W. A. McGraw Agent as liability insurance, conditioned for the benefit of persons suffering losses,

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or damage to persons or property by reason of the negligent operation of the taxicab, by the licensee or his agents; and it is further provided that every such licensee shall add 50¢ per day, or a total of \$15.00 per month, for each taxicab or car so operated until said sum shall reach an aggregate of \$10,000.00. Such cash deposit or bonds shall be carried on each taxicab operated in the sum of \$1000.00 for injury or death of any one person, and eventually not less than the sum of \$5,000.00 for the injury and death of persons affected by any one accident; and not less than the sum of \$1,000.00 for damage to property in any one accident.'

"X did not make all of the cash deposits with the bank as required by the aforesaid Section 12 of the ordinance, although he did partially comply with said section and the city took no legal action to compel him to make the deposits or to prosecute him for his failure so to do. During the time mentioned above, one of X's taxicabs was being driven by his employee with a passenger therein to the city of Farmington, and after entering the corporate limits of the latter city, the taxicab was caused to collide with an electric light pole injuring the passenger who sued for damages. The suit resulted in a judgment against X who has failed to pay it.

"In view of the regulatory ordinance mentioned above is X immune from the penalties and provisions of 'Motor Vehicle Safety Responsibility Act,' particularly Section 4 thereof which provides for suspension of license for failure to pay a judgment (see Acts of the General Assembly 1945 page 1027 - 1222)?"

Pursuant to our subsequent request, you have supplied us with a copy of Section 1 of the ordinance referred to, wherein "taxicab" is defined in the following language:

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"A taxicab under the terms of this Ordinance, shall be and is hereby declared and defined to be a motor vehicle of not more than five passenger capacity, including the driver, operated as a common carrier of persons and/or property for hire within the City of Flat River, Missouri; which said motor vehicle, the owner, and/or operator thereof, hold themselves out to the general public as being willing to transport persons desiring to use their services from point to point within the City of Flat River, Missouri, or from a point within the City of Flat River to anywhere outside of said City for hire, and which said motor vehicle is not operated over a fixed route between fixed points."

The exemption provision in the Motor Vehicle Safety Responsibility Act is found as Section 8470.15, Mo. R.S.A., reading as follows:

"(b) Notwithstanding anything else herein contained, this Act shall not apply with respect to any motor vehicle owned by the United States, the State of Missouri, or any political subdivision of this State, or any municipality therein, nor shall this Act apply to any common carrier or contract carrier whose operations are subject to the jurisdiction of and are regulated by the Interstate Commerce Commission or the Public Service Commission of Missouri, or by regulatory ordinances of the municipalities served by such common or contract carrier, and which shall have satisfied any applicable requirements concerning bond, insurance or proof of financial responsibility imposed by the regulatory authority having jurisdiction over the carrier's operations."

(Underscoring ours.)

Assuming but not determining the validity of the municipal ordinance in question, it becomes apparent that such operations as are described in said ordinance have the effect of exempting the carrier subject thereto from the provisions of the Motor Vehicle Safety Responsibility Act. This exemption, however, is conditioned upon compliance with, as is said in the quoted statute,

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"any applicable requirements concerning bonds, insurance or proof of financial responsibility." It, therefore, becomes pertinent to determine whether or not the particular taxicab operator referred to in your letter of inquiry had in fact complied with the requirements of the ordinance.

Adverting to your letter of inquiry, we note that the ordinance required the posting of cash or bonds in certain stipulated amounts based upon the period of operation. We further note the statement that the particular taxicab operator, as was said in your letter, "did not make all of the cash deposits with the bank as required by the aforesaid Section 12 of the ordinance." It, therefore, seems that the exemption afforded by Section 8470. 15, Mo. R.S.A. would not extend to such operator.

This view is in line with that expressed by this office in an official opinion under date of July 18, 1947, delivered to Mr. Hinkle Statler, Supervisor, Motor Vehicle Registration Unit, Jefferson City, Missouri, wherein we said in paragraph 2 of the conclusion thereof:

"We are further of the opinion that motor vehicles operated as taxicabs within the meaning of that term as defined in the Public Service Commission Act, but which are exempted therefrom, but the operations of which are subject to regulation by municipal authorities, are also exempted from the provisions of the Motor Vehicle Safety Responsibility Act if such municipal regulations include proof of financial responsibility and such requirement is in fact complied with."

(Underscoring ours.)

CONCLUSION

In the premises, we are of the opinion that a taxicab operated in a municipality having a regulatory ordinance containing provisions requiring proof of financial responsibility but with which ordinance compliance has not in fact been made, is subject to the provisions of the Motor Vehicle Safety Responsibility Act.

APPROVED:

Respectfully submitted,

J. E. TAYLOR
Attorney General

WILL F. BERRY, JR.
Assistant Attorney General

APPEALS: The Personnel Advisory Board under the State Merit System Act has jurisdiction to hear an appeal from the order of the Merit System Council.

April 6, 1948



Honorable Ralph J. Turner
Director, Personnel Division
State Department of Business and Administration
Jefferson City, Missouri

Dear Mr. Turner:

This will acknowledge your letter requesting an opinion from this department construing paragraph (b) and Subsection 8 of paragraph (c) of Section 2 of House Bill 162, Laws of Missouri, 1945, page 1157, l.c. 1158. The construction of the terms of said Section 2 of said House Bill 162, as contained in the paragraphs and subsection above mentioned, will require also, we think, a construction of the terms, meaning and effect of paragraph (e) of Section 38, Laws of Missouri, 1945, page 1177, l.c. 1178, as it relates to said paragraphs (b) and (c) of said Section 2 of said House Bill 162 respecting the rights of persons under what was formerly termed the Merit System Council and the Merit System for the Division of Health, Division of Employment Security and Division of Welfare relating to the procedure specified in such statutes in exercising the right of appeal from the order of the Merit System Council.

Your letter consisting of more than two closely typewritten pages requesting this opinion, is as follows:

"The question has arisen as to the construction to be given to Section 2(c)(8) of House Bill No. 162, enacted by the Sixty-third General Assembly, regarding the jurisdiction of the Personnel Advisory Board over Personnel Actions that were taken immediately prior to July 1, 1947, by agencies that were previously under the Merit System Council, the agency responsible for administering the Merit System until July 1, 1947.

"The Merit System Council was the agency that administered the Merit System for the Division of Health, Division of Employment Security, and Division of Welfare up until July 1, 1947, at such time the Personnel Division and Personnel Advisory Board assumed jurisdiction of these agencies so

far as the Merit System was concerned, in accordance with Section 2(b) and 2(c)(8) of House Bill No. 162.

"The effective date of House Bill No. 162 was July 1, 1946. However, all employees who had been selected on the basis of merit and fitness were exempt from the provisions of the act for one year, as is so stated in Section 2(c)(8), which reads as follows:

'All positions and appointments in divisions of the service subject to this act which have been heretofore required to be filled upon the basis of merit and fitness; provided, however, that one year after this act becomes effective this exemption shall cease and determine and thereafter the selection, appointment, pay, tenure and removal of persons to or from all such positions shall be governed by the provisions of this act; and provided further that all persons now or hereafter appointed or employed in divisions of the service on the basis of merit and fitness as heretofore required, shall be entitled, after their exemption from the provisions of this act ceases, to continue as employees in said divisions of the service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this act.'

"Specifically, an appeal has been filed with the Personnel Advisory Board by an employee, the situation being as follows: The said employee had merit status under the Merit System Council. On June 24, 1947 the said employee was notified by an agency that effective June 30, 1947 he would be transferred to a different position. This action resulted in the employee registering a protest both to the Merit System Council and the Personnel Advisory Board to the effect that such action was not a transfer, but was in fact a demotion. On June 30, 1947 the Merit System Council determined that in its judgment the action was a transfer and not a demotion.

As this protest was also filed with the Personnel Division, which took over the functions of the Merit System Council on July 1, 1947, the Personnel Division, in accordance with House Bill No. 162, surveyed the duties that the individual was performing and found that they were of such nature that they called for a lower classification than the employee held on June 30, 1947. Such action is interpreted to be a demotion in accordance with Section 29, House Bill No. 162, which reads as follows:

'* * *Any change of an employee from a position in one class to a position in a class of lower rank shall be considered a demotion and shall be made only in accordance with the procedure prescribed by Section 37 for cases of dismissal. An employee thus demoted shall have the right to appeal to the Board under Section 38 of this Act.'

"Section 2(c)(8) of the act provides that after the exemption from the act ceases, such persons 'shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under this act'. One of such rights is set forth in Section 38(e) which reads as follows:

'Any regular employee who is dismissed or demoted, or suspended, may appeal in writing to the Board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which, at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a

suspension or demotion the Board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion.* * *

"The appellant in this case filed the appeal within the thirty-day period which naturally extended into July, at such time as the Personnel Advisory Board and the Personnel Division had jurisdiction under the act, and the individual was no longer under the jurisdiction of the Merit System Council. Therefore, the question is whether or not the Personnel Advisory Board has the power to hear the appeal and make findings in accordance with Section 38(e) previously cited. Another question if the Personnel Advisory Board does not have power to act in this case, what right does the affected employee have?

"We would appreciate very much receiving an opinion from you in order that the questions outlined herein may be resolved. Should you desire a clarification of any points set forth, please feel free to contact the undersigned."

On page 2 of your letter is a quotation of some of the language and provisions of said paragraph (e) of said Section 38 of House Bill 162, Laws Missouri, 1945, l.c. 1178. The quotation used would appear to make said paragraph (e) of Section 38 mandatory to compel the Board to reinstate any demoted or discharged employee.

Your quote from said Section 38 is only one of three alternative orders which the Board may make after a hearing on appeal.

Since there is no break-down of the continuous text of said Section 38 to correlate different parts of the text of said Section by asterisks, we think it is necessary to have all of the text of said paragraph (e) before us in the consideration of its relationship to said paragraph (b) and (c) of said Section 2 of said House Bill 162. Therefore, we will quote all of paragraph (e) of said Section 38 of House Bill 162, Laws of Missouri, 1945, l.c. 1178, which is as follows:

"Any regular employee who is dismissed or demoted or suspended, may appeal in writing to the Board within thirty days after the effective date thereof, setting forth in substance his reasons for claiming that the dismissal, suspension or demotion was

for political, religious, or racial reasons, or not for the good of the service. Upon such appeal, both the appealing employee and the appointing authority whose action is reviewed shall have the right to be heard and to present evidence at a hearing which at the request of the appealing employee, shall be public. At the hearing of such appeals, technical rules of evidence shall not apply. After the hearing and consideration of the evidence for and against a suspension or demotion the Board shall approve or disapprove such action and in the event of a disapproval the Board shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as he has lost by reason of such suspension or demotion. After the hearing and consideration of the evidence for and against a dismissal the Board shall approve or disapprove such action and may make any one of the following appropriate orders. (1) Order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal. (2) Sustain the dismissal of such employee, unless the Board finds that the dismissal was based upon political, social, or religious reason, in which case it shall order the reinstatement of the employee to his former position and the payment to the employee of such salary as has been lost by reason of such dismissal. (3) Except as provided above the Board may sustain the dismissal, but may order the name of the dismissed employee returned to an appropriate reinstatement register, or may take steps to effect the transfer of such employee to a comparable position in another department. The board shall establish such rules as may be necessary to give effect to the provisions of this section."

The right of appeal is purely statutory in Missouri. 3 C.J. Section 29, page 316 states the text on the origin and present status of the right of appeal as follows:

"The proceeding by appeal was entirely unknown to the common law. It is of civil-law origin, and

was introduced therefrom into courts of equity and admiralty. Consequently, the remedy by appeal in actions at law, and in this country in equity also, is purely of constitutional or statutory origin, and exists only when given by some constitutional or statutory provision. * * * *

The same work, same volume, section 464, page 616 states again, on the right of appeal, the following text:

"* * * On the other hand, although the right of appeal is wholly statutory, it is available to any party who comes within the statute granting the right, and cannot be denied or abridged by the courts except as authorized by the statute.* * * "

Our Supreme Court in the case of Thomas et al. v. Elliott et al. 215 Mo. 598, l.c. 602, 603, on the right of appeal said:

"* * * Right of appeal is given by statute and unless the person who feels aggrieved by the action of the trial court is given the right of appeal by the statute he has no such right. The General Assembly is not compelled to give such right; it may give or withhold it as in its discretion may seem best. * * * "

Our St. Louis Court of Appeals in the case of Bussiere v. Sayman, 171 Mo. App. 11, l.c. 14, made the following pronouncement on the right of appeal:

"Though the right of appeal is purely statutory, it is available to every party who prosecutes one within the terms of the statute authorizing it.* * * "

The effective date of H.B. 162, now found in Laws of Missouri, 1945, page 1157, was July 1, 1946. Exemptions were granted in subsection 8 of paragraph (c) of Section 2, Laws of Missouri 1943, l.c. 1159 from the terms of said act to all persons who were appointed upon the basis of merit and fitness under the former Merit System Council for the period of one year. Said subsection 8, in the second proviso thereof, directs that after such exemptions from the provisions of said H.B. 162 had ceased said employees should continue as employees in said divisions of this service and shall have all the rights and privileges in such employment as are provided for persons appointed and qualified under the Act. (H.B.162). The exemptions granted the persons formerly employed under the previous

Merit System Council ceased on July 1, 1947.

Among the "rights and privileges" to be possessed and exercised by such employees or appointees of the former Merit System Council after the removal of such exemptions and which continue to be held by them by continuing them as employees in the division of service set up by said H.B. 162, under said subsection 8 of paragraph (c) of said Section 2, aforesaid, was, and is, under paragraph (e) of Section 38, Laws of Missouri 1945, pages 1177 and 1178, the right of appeal by any employee, who is dismissed or demoted or suspended, by setting forth in writing to the Board, within thirty days after the effective date thereof, his reason for claiming that the dismissal, suspension or demotion was for political, religious or racial reasons, or not for the good of the service. The Personnel Division and Personnel Advisory Board assumed jurisdiction for the administration of the Merit System Act, under the terms of House Bill 162, as now found in Laws of Missouri, 1945, page 1157, as we are advised in your letter requesting this opinion, on July 1, 1947. It is further stated in your letter that an employee having a merit status under the former Merit System Council was notified by that agency on June 24, 1947 that as of June 30, 1947 he would be transferred to a different position. This action, it is said, resulted in the employee protesting to both the Merit System Council and the Personnel Advisory Board that said employee interpreted the said transfer to a different position to be a demotion rather than a transfer. On June 30, 1947, it is further related, the Merit System Council determine that, in its judgment, the action was a transfer and not a demotion. It is further stated that the protest of the employee--and by this we understand the protest to mean a written protest--was filed with the Personnel Division under the new Act, House Bill 162, on or about July 1, 1947, and that the said employee, so transferred or demoted, as the case might terminate, still protesting, and, in the assertion of his rights under said paragraph (e) of said Section 38 of said H.B. 162, filed his written appeal within the thirty day period after June 30, 1947, the date of the rendition of the judgment of the Merit System Council. But it was held by the Merit System Council that the change in the employee's status was a transfer and not a demotion. The said thirty day period of time for the appeal extended over into July 1947 when and after which the Personnel Advisory Board and the Personnel Division had complete jurisdiction over the administration of the Act known as said H. B. 162, including matters of appeal.

It appears from your letter that the said employee prosecuting his appeal from the order of the Merit System Council, took steps

to perfect his appeal immediately after the decision of the Merit System Council of which he complains, as being a demotion instead of a transfer. This was one year after the effective date of H. B. 162. All persons concerned in the administration of the Act as officers in the performance of their duties under the Act, or as employees, must have been aware of the terms of the Act, among which was the right of appeal. It would appear that the said employee lodged his written appeal with the Personnel Advisory Board and the Personnel Division within the time prescribed and in the manner prescribed in H. B. 162. As we have observed hereinabove the employee under discussion had the statutory right under said paragraph (e) of Section 38 of said H. B. 162 to appeal since he had the same status as any other regular employee under said Act. As we observe the terms of said H. B. 162 the appeal of the employee now being prosecuted by him was lawfully lodged with the Personnel Advisory Board and the Personnel Division within the time and in the manner prescribed by law, and that the said Personnel Advisory Board has the power to hear his appeal and make its findings in accordance with said paragraph (e) of said Section 38 of said House Bill 162.

Having concluded that the Personnel Advisory Board may hear and determine the appeal of said employee, the further status of said employee as inquired of in the last sentence of the second to last paragraph in your letter need not be considered.

CONCLUSION

It is therefore, the opinion of this department that under the facts given in the letter submitted by you requesting this opinion, and under the terms of said H. B. 162, now found in Laws Missouri, 1945, page 1157, and other authorities cited, the Personnel Advisory Board, provided for in said H. B. 162, has jurisdiction to hear and determine the appeal of an employee of the former Merit System Council from its order demoting or transferring him, as is provided under the terms of paragraph (e) of Section 38, Laws of Missouri, 1945, pages 1177 and 1178.

Respectfully submitted,

APPROVED:

J. E. TAYLOR
Attorney General

GEORGE W. CROWLEY
Assistant Attorney General

GWC:mw

TRAINING SCHOOLS:
STATE MERIT SYSTEM ACT:

By reason of certain enactments of the 63rd General Assembly, the director and superintendents of training schools of the State of Missouri are within the provisions of the State Merit System Act.

October 14, 1948



Mr. Ralph J. Turner, Director
Personnel Division
Department of Business and Administration
630 Jefferson Street
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your recent request for an opinion. Omitting the references in your letter to certain sections of the Missouri statutes, your specific question reads:

"In order to clarify certain questions, we would like an opinion as to whether or not the Director of the Board of Training Schools and the Superintendents of the Training Schools are subject to the State Merit System Act, House Bill No. 162, Sixty-third General Assembly."

The 63rd General Assembly of the State of Missouri enacted Article I, Chapter 83A, Mo. R.S.A., which group of statutes was given the short title, "State Merit System Act," Under said act, Section 12851.2, Mo. R.S.A., (see Pocket Part, page 8), the Legislature established a basis for the employment of personnel in certain specific departments by merit. Section 12851.2(b), Mo. R.S.A., provides that, among others, the State Department of Corrections is subject to the provisions of the State Merit System Act. Said section then proceeds to enumerate the specific offices, positions and appointments in the agencies covered by this act that are exempt from the operation of said act and which may be filled without regard to the provisions thereof. The only general test of exemption laid down in Section 12851.2, supra, is found in subsection (c)(1), which reads as follows:

"(1) Members of boards and commissions and heads of departments required by law to be

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appointed by the Governor, except the Personnel Director."

All of the subsequent exemptions in Section 12851.2, supra, are specifically nominated. It might be further pointed out that no place in Section 12851.2, supra, are the director of the board of training schools and the superintendents of the training schools exempted from the provisions of the State Merit System Act. The State Department of Corrections was established under Article 1A, Chapter 48, Section 8992.1, Mo. R.S.A. Within this Department of Corrections, the Legislature saw fit to enact Section 8992.20, which created a state board of training schools and enumerated said board's powers and duties. Said section reads as follows:

"There is hereby created and established a state board of training schools which shall have charge and control of all training schools and industrial homes for boys and girls of this state: specifically, the training school for boys at Boonville; the industrial home for girls at Chillicothe, which hereafter shall be known as the training school for girls; and the industrial home for Negro girls at Tipton, which hereafter shall be known as the training school for Negro girls together with all branches and divisions thereof; and over all institutions for correctional training of juveniles which may hereafter be created in this state; which schools are hereby classified as educational institutions and recognized to have as their purpose the special correctional training, the education and the moral rehabilitation and guidance of juvenile offenders which any court of proper jurisdiction may assign to such institutions. In relation to any of the above named juvenile training schools, whenever the term commission of penal institutions is used in any act, it shall hereafter be understood to mean the state board of training schools."

(Note: These sections now being referred to may be found in Mo. R.S.A., Pocket Part, Vol. 19.)

The intent of the Legislature to completely divorce the state board of training schools from the Department of Corrections is evidenced by Section 8992.21, Mo. R.S.A., wherein it is provided:

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"The state board of training schools shall, pursuant to Section 12, Article IV, of the Constitution of Missouri, be assigned to the division of educational institutions in the department of corrections and shall be in charge of said division, but shall not be subject to orders of the director of said department of corrections and shall have only such relationship with the department of corrections as is set out in this act."

We think it clear that these two statutes, when construed together with the whole chapter creating the Department of Corrections, clearly demonstrates that it was the intention of the Legislature to establish within the Department of Corrections a separate division concerning only the state board of training schools and the training schools enumerated in Section 8992.20, supra, and the board's powers and duties relative thereto.

Appointment to the state board of training schools is made by the Governor (see Section 8992.22, Mo. R.S.A.). In furtherance of the powers delegated by the Legislature to the board of training schools, the Legislature enabled the board, by Section 8992.27, Mo. R.S.A., to perform the following function:

"The state board of training schools shall appoint a director, who shall be chief administrative officer for the board, and under the direction of the board and he shall have immediate control of the institutions, activities, employed personnel and programs of the board. The director shall be a citizen of the state of Missouri selected for his recognized character and integrity, and because of experience fitting him for successful performance of his duties. Before entering upon his duties, the director shall take an oath or affirmation to support the constitution of the United States and of the state of Missouri and to faithfully perform the duties of his office; and shall enter into good and sufficient corporate surety bond, conditioned upon the faithful performance of his duties, said bond to be approved by the attorney general as to form, and by the governor as to sufficiency; the premium on said bond to be paid by the state."

Mr. Ralph J. Turner

Up to this point, we have seen that the Merit System specifically exempts any person required by law to be appointed by the Governor to any of the therein named departments; that Section 8992.20, supra, requires the Governor to appoint the board of training schools, which, under the test set out in Section 12851.2(c), would exempt the board of training schools from the Merit System. However, we also see in Section 8992.27, supra, that it is the duty of the state board of training schools to appoint the director of the training schools. Therefore, the director of training schools does not come within the specific exemptions of Section 12851.2(c) et seq., nor within the general exemption provided those persons required by law to be appointed by the Governor. Relative to the superintendents of training schools, Section 8992.29, Mo. R.S.A., provides that:

"It shall be the duty of the director of training schools, with approval of the board, to appoint for each of the juvenile training schools a superintendent
* * *

Likewise, the superintendents, therefore, do not come within any of the specific exemptions in Section 12851.2, supra, or within the purview of the general exemption provided for those persons holding offices, positions or employment in the Department of Corrections and required by law to be appointed by the Governor.

Under the statutes cited and referred to above, we see that the state board of training schools appoints the director of training schools, and the director in turn, with approval of the state board of training schools, appoints the superintendents of each training school. The director of training schools and the superintendents of the training schools are not afforded the immunity from the State Merit System Act as is offered the director and assistant director of the State Department of Corrections. Section 8992.2, Mo. R.S.A., specifically provides that the director of the State Department of Corrections shall be appointed by the Governor. This, alone, would bring the director of the Department of Corrections under the general exemption found in Section 12851.2(c), supra. However, the Legislature, not content with that exemption, specifically provided in Section 8992.4, Mo. R.S.A., that the director and assistant director of the Department of Corrections are exempt from selection on the basis of merit as provided by law. As pointed out above, the training schools and the board, the director and superintendents of said training schools are carved out from the State Department of Corrections, and function as an independent division, subject only to the limitations as announced in Section 8992.21, Mo. R.S.A.

Mr. Ralph J. Turner

Section 8992.30, Mo. R.S.A., provides as follows:

"It shall be the duty of the board of training schools to select and employ all employees on a basis of merit as provided by law, and who shall be persons of recognized good character and integrity."

We do not believe it sound to argue that, while this section requires that all employees shall be appointed on a basis of merit, the director and superintendents of the training schools occupy a different category from that of an employee. Should this deficiency of Section 8992.30, supra, bear some merit as an argument that the director and the superintendents of the training schools should not be under the State Merit System, the Merit System itself expressly states its applicability to "offices, positions and employees." (See Section 12851.1 et seq., Mo. R.S.A.)

CONCLUSION

By reason of the above quoted enactments of the 63rd General Assembly, it is the analysis and opinion of this department that the director of the training schools and the superintendents of training schools of the State of Missouri are within the provisions of the State Merit System Act.

Respectfully submitted,

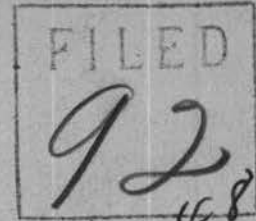
WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR Attorney General

TAXES: Limitations of time in which suits may be brought for
BRIDGES: collection of delinquent taxes on bridges across rivers.

December 10, 1948



Mr. Curt M. Vogel
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Sir:

This is in reply to yours of recent date wherein you request an opinion on the procedure for collection of delinquent taxes on the Chester bridge at Chester, Illinois over the Mississippi river and which connects Chester, Illinois and Perry County, Missouri.

The two questions submitted are,: (1) Assuming that there is a tax liability on the part of Chester, Illinois when must action be taken to preserve the tax lien? Must this be done prior to January 1, 1949, to protect the tax lien for the 1944 assessment? (2) Is the City of Chester, which is a municipal corporation, as owner of said bridge, liable to the State of Missouri and Perry County as would be a regular corporation or individual.

On the second question which you have submitted I find that this department on the 19th day of January, 1942, by an opinion to the Honorable Mark Morris, prosecuting attorney of Pike County, Missouri, considered and ruled on the same question. I am enclosing a copy of this opinion for your information.

In your first question you state that the taxes in question were those which were assessed in 1944. The taxes assessed here on this bridge were assessed under authority of Section 11295, R.S. Mo. 1939. This Act authorized the assessment of taxes on such bridges, and the levy and collection of such tax was to be in the same manner as that of levying and collecting taxes on railroad property.

Under Section 11268, R. S. Mo. 1939, taxes on railroad property became delinquent on the first of December next after the same became due and payable.

Under Section 10940, R. S. Mo. 1939, which was in effect at the time the tax here involved became delinquent, it is provided that every person holding property on the first of June would be

liable for taxes thereon for the ensuing year. In other words, prior to the 1945 Constitution, taxes were assessed as of June 1, of a certain year and the taxes were levied and collected on that assessment in the ensuing year. So the taxes which were assessed on this bridge in 1944 would be levied and collectible in 1945 and would not become delinquent until the first day of December, 1945.

Then on the question of the time within which suit for the collection of such taxes must be brought, we refer to Section 11165, R. S. Mo. 1939, which provides, in part, as follows:

"No proceedings for the sale of land and lots for delinquent taxes under the provisions of Chapter 74, Revised Statutes of Missouri, 1939, relating to the collection of delinquent and back taxes and providing for foreclosure sale and redemption of land and lots therefor, shall be valid unless initial proceedings therefor shall be commenced within five(5) years after delinquency of such taxes, and any sale held pursuant to initial proceedings commenced within such period of five(5) years shall be deemed to have been in compliance with the provisions of said law in so far as the time at which such sales are to be had is specified there: * * *"

Under this section it will be seen that suit for delinquent taxes on this bridge may be brought at any time within five years after they become delinquent, that is, taxes for the 1944 assessment, as we have stated above, became delinquent on December 1, 1945.

In the case of State ex rel. v. Carr, 178 Mo. 229, the court held that if a suit for taxes is brought within five years from the date such taxes became delinquent it is not barred by the foregoing statute of limitations.

Under these authorities and statutes it would therefore appear that taxes on the Chester bridge which were assessed on the valuation as of June 1, 1944, and which became delinquent on December 1, 1945, would not be barred by the statute of limitations until December 1, 1950.

CONCLUSION

From the foregoing, it is the opinion of this department that taxes on the Chester Bridge at Chester, Illinois over the Mississippi river, which were assessed in 1944 and levied in 1945 and became delinquent on December 1, 1945, are not barred by the five year

Mr. Curt M. Vogel

-3-

statute of limitations, to-wit, Section 11165, R. S. Mo. 1939.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw
Enc.

MOTOR VEHICLES: Relating to licenses for local commercial motor vehicles.

January 14, 1948

FILED

93

1/23

Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein you request an opinion from this department on the following statement of facts and question:

"The Service Transport Sanitary Milk Producers, Incorporated is composed of a group of farmers and a company in St. Louis which operates under the name of Sanitary Milk Producers. This company, the Sanitary Milk Producers, is backing the Service Transport, a group of farmers who are incorporated, so they may procure milk from the farmers for the operation of their plant. The group hires small trucks to pick up the milk on the farm and haul it to Oakwood, Missouri, where it is transferred to semi-trailer trucks owned by the corporation and hauled to the plant in St. Louis, Missouri. The trucks are titled in both names of the corporation, the Service Transport and Sanitary Milk Producers.

"We ask that you give us an opinion as to whether or not the corporation can legally operate either the semi-trailer trucks or the small trucks on a local license."

We note from your request and file attached thereto that there are two questions submitted, namely: (a) may the semi-trailer trucks titled to Service Transport Sanitary Milk Producers and Sanitary Milk Producers operate under what is termed a "local commercial motor vehicle" license; (b) may the small trucks, hired by the Service Transport Sanitary Milk Producers, Inc., to pick up milk on farms and haul it to Oakwood, operate under a local commercial motor vehicle license.

From a reading of your letter, it might appear that the Service Transport Sanitary Milk Producers is incorporated. We have made inquiry at the office of the Secretary of State and have been informed that there is no record in that office of the incorporation of that concern. However, in your letter you state that this concern is composed of a group of farmers who procure milk from farmers in a trade territory for transportation and sale to the St. Louis company, the Sanitary Milk Producers. We do find, however, that the Sanitary Milk Producers is a corporation and from a statement by you to the department, it is this corporation which owns the semi-trailer trucks referred to in your letter.

If these vehicles are operated as "local commercial motor vehicles," then the license fee under Section 8369, Laws of Missouri, 1945, page 1197, would be one-third of the fee required for commercial motor vehicles, except that in any event, the minimum fee would be \$10.00.

We think the answer to your question rests entirely on the construction of statutes. The term "local commercial motor vehicle" is defined under the statutes as follows, Section 8369, Laws of Missouri, 1945, page 1199:

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, of this act, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or

"3. In making hauls not exceeding 25 miles in length, or

"4. When controlled or operated by any person or persons principally engaged in farming when used exclusively in the transportation of agricultural products or livestock to or from a farm or farms, or in the transportation of supplies to or from a farm or farms."

The term "commercial motor vehicle" is defined in Section 8367, Laws of Missouri, 1945, page 1195:

" * * * 'Commercial motor vehicle.' A motor vehicle designed or regularly used for carrying (a) freight and merchandise, or (b) more than eight passengers. * * * "

Since the lawmakers have provided for a reduction in the license fee for local commercial motor vehicles, then we think this provision would come within the classification of a partial exemption from the commercial motor vehicle license rate. Since it is in the nature of an exemption from a license tax, then we think the rule that a person to be within an exemption class must show clearly that he is within that class. Applying that principle here, the trucking concerns must show that they are transporting property (1) wholly within a municipality or urban community, or (2) wholly within any municipality or urban community or a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or (3) making hauls not exceeding 25 miles in length, or (4) principally engaged in farming when used exclusively in the transportation of agricultural produce or livestock to or from a farm or farms or in the transportation of supplies to or from a farm or farms.

In your request and the enclosures attached thereto, you do not state how far the small trucks travel to pick up the milk and haul it to Oakwood, Missouri, where it is transferred to the semi-trailer, and then haul it to the plant in St. Louis. Of course, if any of these hauls come within the first three classifications above named, whether by the small trucks or by the semi-trailer, then they would come under the classification of a local commercial motor vehicle.

As stated above, the semi-trailer trucks are owned by the Sanitary Milk Producers, a corporation, and it appears from your letter that these trucks are titled in both the name of the corporation and the Service Transport Sanitary Milk Producers. Under this set of facts, we do not believe that the owners of the semi-trailer trucks could qualify as local commercial motor vehicle operators under subsection 4, supra, because it could not be said that the Sanitary Milk Producers are principally engaged in farming. In order to obtain the benefits of this, what may be termed a partial exemption from the license rate, the operators of such vehicles must show clearly that they come within that classification.

As to the small trucks which are hired and used to pick up the milk on the farm and haul it to Oakwood, and which do not come within the first, second or third classifications of Section 8369, we think the ownership of these small trucks would determine whether or not they come within this classification. If these small trucks are controlled and operated by farmers who are principally engaged in farming, and if they are used exclusively in the transportation of dairy products, which are agricultural products, to or from the farm, then they would come within the partial exempted classification as a local commercial motor vehicle.

CONCLUSION

From the foregoing, it is the opinion of this department that the semi-trailer trucks owned and operated by the Sanitary Milk Producers, a corporation, and titled in both the names of Service Transport Sanitary Milk Producers and Sanitary Milk Producers, would not come within the classification of local commercial motor vehicles under Section 8369, Laws of Missouri, 1945, page 1199, because they are not controlled and operated by persons principally engaged in farming.

As to the small trucks used to pick up milk on the farm and transport it to Oakwood, if the activities of these trucks come within subdivisions 1, 2 and 3 of said Section 8369, then of course they would be entitled to the local commercial rate. We are further of the opinion that if these small trucks are operated and controlled by persons principally engaged in farming and are used exclusively in the transportation of agricultural products to or from the farm that these trucks would come within the classification of local commercial motor vehicles.

Respectfully submitted,

TYNE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

MOTOR VEHICLES: Motorcycle dealer's license plates may not
DEALERS: be used on automobiles offered for sale by
such dealers.

January 22, 1948

FILED

93

21.3

Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

This is in reply to your letter of recent date wherein
you request an official opinion on the following statement
and question:

"A motorcycle dealer, whose business is
primarily the selling and exchange of new
and used motorcycles, on occasion takes
in an automobile and offers it for sale.

"The question has been raised by the
dealer as to whether or not he has a
right to use his motorcycle dealers
license plates on cars which he offers
for sale, in the business of his dealer-
ship."

The statutes providing for licensing of motor vehicle
dealers contain the following provisions, Laws of Missouri,
1945, page 1195. Section 8367 defines the terms "dealer,"
"motorcycle" and "motor vehicles" as follows:

"'Dealer.' Any person, firm, corporation,
association, agent or sub-agent engaged
in the sale or exchange of new, used or
reconstructed motor vehicles or trailers."

"'Motorcycle.' A motor vehicle operated
on two wheels."

"'Motor vehicle.' Any self-propelled
vehicle not operated exclusively upon
tracks, except farm tractors."

Section 8371 of the act, Laws of Missouri, 1945, page
1199, requires dealers to make application for a dealer's
license and to pay a fee therefor. This section provides

only one rate for registration as a dealer. The registration fee is \$21.00, which includes two sets of number plates, and for an additional \$10.50, a duplicate set of number plates may be obtained by the dealer.

On the question of whether or not a dealer who has motorcycle dealer's license plates may use these plates on automobiles which he may sell, we think the question would be determined by whether or not such a dealer is violating any of the motor vehicle laws. Subsection (b) of Section 8377, Laws of Missouri, 1947, page 385, provides as follows:

"(b) The plates issued to manufacturers and dealers shall bear the letter 'D' preceding the number and the Director of Revenue is authorized to place upon such number plates other letters or marks to distinguish commercial motor vehicles and trailers and other types of motor vehicles."

These provisions would authorize the Director of Revenue to have placed on plates letters or marks to distinguish them from being a dealer's license for automobiles or for motorcycles, etc. Subsection (c) of this same section provides as follows:

"(c) Before being operated on any highway of this state every motor vehicle or trailer shall have displayed the permanent license plates or temporary permit issued by the Director of Revenue entirely unobscured, unobstructed, all parts thereof plainly visible and kept reasonably clean, and so fastened as not to swing. On all motor vehicles one plate shall be displayed on the front and the other on the rear of such motor vehicle, not less than eight nor more than forty-eight inches above the ground, except that on trailers, motorcycles, motortricycles and motor scooters one plate shall be so displayed on the rear thereof."

This section, it will be noted, requires a license plate to be displayed on the front and rear of motor vehicles, except trailers, motorcycles, motortricycles and motor scooters, which shall be required to display only one plate on the rear thereof. Since a dealer in motorcycles would have only one license plate under this section, then he would not be complying with the law if he attempted to sell automobiles under the

dealer's license issued to him to sell motorcycles.

If such a dealer is not complying with the law, then we think he would be subject to the penalties provided for in subsection (d) of Section 8404, R. S. Mo. 1939, which reads as follows:

"(d) Any person who violates any of the other provisions of this article shall, upon conviction thereof, be punished by a fine of not less than five dollars (\$5.00) or more than five hundred dollars (\$500.00) or by imprisonment in the county jail for a term not exceeding two year, or by both such fine and imprisonment."

The sections of the statutes hereinbefore referred to and reenacted in Laws of Missouri, 1945 and 1947, were originally in Article 1, Chapter 45, which is the same article referred to in subsection (d) of Section 8404, hereinabove set out. Therefore, since the motorcycle dealer has only one license plate to be displayed on the rear of motorcycles sold by him, then he could not comply with subsection (b) of Section 8377, Laws of Missouri, 1947, supra, and as a result thereof, he would be subject to the penalties imposed by said subsection (d) of Section 8404, R. S. Mo. 1939.

CONCLUSION

From the foregoing, it is the opinion of this department that a motor vehicle dealer, who has motorcycle license plates issued to him by the Director of Revenue, may not use such plates on automobiles which he offers for sale in the business of a motor vehicle dealer.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

PROBATE JUDGE: Probate judge not licensed to practice law
may succeed himself in office, if he was holding
OFFICERS: said office on March 30, 1945.

February 10, 1948

FILED

93

7/20

Honorable W. R. Walker
Member, Missouri Senate
64th General Assembly
Jefferson City, Missouri

Dear Sir:

This will acknowledge receipt of your request for an
opinion which reads:

"I would like to have your official
opinion upon this question:

"Can a probate judge, who is not a lawyer,
and who was elected at the last general
election, be a candidate to succeed him-
self?"

Section 25 of Article V, Constitution of Missouri, 1945,
provides that every judge and magistrate shall be licensed to
practice law, except that probate judges now in office may
succeed themselves as probate judges without being so licensed.
Also, the persons who are now justices of the peace, or who
may have heretofore been justices of the peace in the state
for at least four years, are eligible to the office of magis-
trate without being licensed. We are primarily interested
only in the probate judge in this instance. While it is true
that in counties having a population of 30,000 inhabitants
or less, the probate judge is also the judge of the magistrate
court. However, in such cases, he must qualify for probate
judge and not for magistrate. Therefore, we need only look
to the qualifications of a probate judge. Section 25 of
Article V, supra, reads:

"Judges of the supreme court and courts
of appeals shall have been citizens of the
United States for at least fifteen years,
and qualified voters of this state for
nine years next preceding their selection.
Such judges shall be at least thirty years
of age but shall not continue to hold
office after attaining seventy five years
of age. Judges of the courts of appeals
shall be residents of the district of their

court. Circuit judges shall have been citizens of the United States for at least ten years, and qualified voters of this state three years next preceding their selection, and be not less than thirty years of age and residents of the circuit. Judges of probate and magistrate courts shall be qualified voters of this state, and residents of the county. Probate judges shall be at least twenty five and magistrates at least twenty two years of age. Every judge and magistrate shall be licensed to practice law in this state, except that probate judges now in office may succeed themselves as probate judges without being so licensed, and except that persons who are now justices of the peace, or who have heretofore been justices of the peace in this state for at least four years, shall be eligible to the office of magistrate without being so licensed."

Webster's International Dictionary, Section Edition Unabridged, defines the word "succeed" as follows:

"1. To come next after another person into an office, into possession of an estate, or the like; to fill a vacancy in an inherited, elective, or appointive office; * * * * *

"2. To follow another thing in order; to come immediately after by natural necessity, in a prescribed course, or by order of development or occurrence; * * * "

Under the foregoing definitions, unquestionably any probate judge may continue to succeed himself in office as often as the electorate votes for him to retain such office. Had the framers of the Constitution in 1945 intended that such officer could only succeed himself for one term, they should have so limited his service, but in the absence of any such restriction, we are of the opinion that he may continue to succeed himself in office. However, he must have been holding the office at the time of the adoption of the Constitution of 1945, and his terms of office must be continuous.

It now becomes necessary to determine when the foregoing constitutional provision became effective, and also to determine if the probate judge, referred to in your request, was the incumbent in that office at the time the said constitutional provision became effective? Section 3 of Article XV, Constitution of 1875, which provision was in effect at the time of the adoption of the Constitution of 1945, reads in part:

"* * * Upon the approval of such Constitution or constitutional amendments in the manner provided in the last preceding section such Constitution or constitutional amendments shall go into force and effect at the end of thirty days after such election. The result of such election shall be made known by proclamation by the governor."

Section 3(c) of Article XII, Constitution of Missouri, 1945, follows the foregoing constitutional provision as to the effective date of constitutional amendments or new constitutions. Section 11684, R. S. Mo. 1939, requires the Secretary of State to certify the result of such vote on constitutions or constitutional amendments to the Governor of the state, who shall thereupon issue his proclamation declaring such amendments or constitutions ratified and binding. Section 11684 reads:

"If, upon such returns so made to the secretary of state, it is found that there is a majority of the qualified voters of the state voting for and against any one of said amendments, in favor of such amendments, the same shall be deemed and taken to have been ratified by the people, and the secretary of state shall certify the result of such vote to the governor, who shall thereupon, without unnecessary delay, issue his proclamation declaring such amendment ratified by a majority of the qualified voters of this state, and valid and binding to all intents and purposes as a part of the Constitution of the state of Missouri."

The election on the new proposed Constitution of Missouri, 1945, was submitted to the voters by the Constitutional Convention on February 27, 1945. The Governor of this state,

Honorable Phil M. Donnelly, on the 3rd day of March, 1945, issued his proclamation declaring the vote on the proposed new constitution, and further, declared that on or after the 30th day of March, 1945, it shall become the supreme law of the state.

Therefore, we conclude that on and after the 30th day of March, 1945, the Constitution of Missouri, 1945, became the law in this state. Whether or not the probate judge referred to in your request may be a candidate to succeed himself depends upon whether he was the incumbent in that office on March 30, 1945. If he was, then we believe under the foregoing constitutional amendments that he may be a candidate to succeed himself. If he was not the incumbent at that date, then he may not succeed himself.

CONCLUSION

It is the opinion of this department that your probate judge may become a candidate to succeed himself in office, only if on the 30th day of March, 1945, he was holding the office of probate judge in your county.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR *JB*
Attorney General

ARR:VLM

RECIPROCITY: Reciprocity agreement between Missouri and Illinois does not apply to Missouri vehicle licensed for local operation while operating in Illinois.

3-25



March 23, 1948

Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

Your opinion request of recent date reads as follows:

"The Motor Vehicle Unit, Department of Revenue, and this department are aware of the fact that some operators of commercial vehicles purchase a local license for the truck and operate in the adjoining states, a distance in excess of the twenty-five-mile local limit. This method of evasion of the license fee is practiced by some companies whose vehicles are domiciled within twenty-five miles of the state line. This enables the truck to cross the state boundary without exceeding the local authority in this state.

"We feel that any such operation into a neighboring state in excess of the local authority is in violation of the reciprocity agreement between this state and adjoining states, particularly with the state of Illinois, in which most of this type of operation takes place. The reciprocity agreement with Illinois reads in part as follows.

"... Provided that such operation shall not otherwise be in violation of the laws of the state extending such operation (underscoring is ours).

"It is requested that your department give us an opinion as to the legality of such operation under the reciprocity agreement with the adjoining states, and if under our statutes the operator could be forced to buy a beyond-local license even though his operation in this state does not exceed the authority of a local license."

During the Sixty-second General Assembly of Missouri, 1943, there was enacted House Bill No. 66, to be known as Section 5728a, which authorized the Public Service Commission of Missouri to negotiate contracts or agreements with other states and the District of Columbia relative to motor vehicles licensed in this state. See Laws of Missouri, 1943, page 867. Pursuant to the authority vested therein, the Public Service Commission of Missouri entered into negotiations with Illinois and reached an agreement concerning the reciprocity to be granted motor vehicles operated within the two states. This agreement was adopted, by order of the Commission, on the 10th day of December, 1943. This agreement reads, in full, as follows:

"A RECIPROCITY AGREEMENT between the States of Missouri and Illinois, whereby each State grants to the residents of the other full reciprocity, subject to restrictions as set out herein, as to their motor vehicles operated within the two states and properly registered and licensed in either as the state of domicile.

"It is hereby agreed that the resident owner or operator of any motor vehicle, trailer or semi-trailer upon which all fees and taxes have been paid in either the state of Missouri or Illinois as the proper state of domicile, shall while engaged in interstate commerce but not operating for hire between fixed termini in the state granting reciprocity be permitted to operate into the reciprocating state in interstate operations on lawful business and on the same basis as permitted by the registration of its state of domicile without the payment of further registration and privilege license fees; provided that such operation shall not otherwise be in violation of the laws of the state extending such reciprocity; and provided further, that whenever an owner or operator shall maintain a vehicle at any terminal upon an interstate route, which vehicle for other legal purpose might ordinarily be regarded as engaged in 'interstate commerce' by reason of the character of its operations, but which is engaged in such operations exclusively within the state of non-domicile,

such vehicle shall not be exempt under this agreement, but shall be registered in, and subject to taxation by, the state of non-domicile.

"It is further hereby agreed that any individual residing, or corporation or other legal entity organized or chartered in the state of Missouri or Illinois or elsewhere, but who had his or its principal place of business in either of said states on or before July 22, 1943, and who has complied with the laws of such state with respect to registration and payment of all fees and taxes for his or its motor vehicle, trailer or semi-trailer, at said time, shall in addition to such persons as fall within the common and legal definition of the word 'resident', be deemed a resident of the state in which such principal place of business was so situated on said date, and such state shall likewise be regarded as his or its 'domicile'.

"It is further agreed and understood that if any person, firm or corporation that would have been entitled to the benefits of this agreement if same had been in force and effect as of July 22, 1943, shall move his or its principal and general office from either state to the other, then he or it shall not be entitled to the benefits hereof until after the expiration of one year from the date he or it opens his or its principal and general office in the other state. It is further provided that if upon dissolution or reorganization, a former firm corporation, family or entity attempts to operate under a new or similar trade or corporate name and shall move from either state to the other, then he or it shall not be entitled to the benefits hereof until after the expiration of one year from the date said new organization or entity has opened his or its principal and general office in the other state.

"It is further agreed that either party may terminate this agreement by giving thirty (30) days written notice to the other party. It is also further agreed that the authorized representatives of the two states will formulate regulations governing the issuance of permits and method of identification of the exempted vehicles provided for herein. This agreement shall be in full force and effect as of the 21st day of November, 1943."

As this department perceives your question, an operator of a commercial vehicle, a resident of and domiciled in Missouri, obtains authorization for local commercial vehicular activity only, pursuant to House Bill No. 240, now Section 8369, Laws of Missouri, 1943, page 664, wherein it provides:

"The term 'local commercial motor vehicle' includes every 'commercial motor vehicle' as defined in Section 8367, Revised Statutes of Missouri, 1939, while operating within this state and used for the transportation of persons or property:

"1. Wholly within any municipality or urban community, or

"2. Wholly within any municipality or urban community and a zone extending 25 air miles from the boundaries of any municipality or urban community, or contiguous municipality or urban community, or"

While being so licensed, the operator engages in two types of activities: (1) while operating within the territorial boundaries of Missouri, the operator confines his activities to those authorized by his license; (2) but, said operator being within twenty-five miles of the boundary of Illinois, traverses that distance, or less, and proceeds to operate in Illinois, at a distance in excess of twenty-five miles, as authorized by his Missouri license. As we understand the situation, the operator's activities while within the territorial limits of Missouri are not in excess of the license, however, the operator's activities while outside the territorial

limits of Missouri are presumably in excess of the license. In short, all the activities of which complaint is made occur in Illinois and not in Missouri. The reciprocity agreement between Illinois and Missouri was made pursuant to a statute, Section 5728a, Laws of Missouri, 1943. And, assuming this reciprocity agreement has equal force with a statute, it is elementary that said agreement has no extraterritorial force, *Stanley v. Wabash, St. L. & P. Ry. Co.*, 13 S.W. 709, 100 Mo. 435, 8 L.R.A. 549. Lacking extraterritorial effect the reciprocity agreement cannot be used to coerce operators of commercial vehicles to purchase beyond-local licenses. Furthermore, the portion of the agreement set out above indicates that both Illinois and Missouri contemplated such activities as outlined in your letter. Foreseeing that violations of their respective laws might occur, each state exempted from the protection of the reciprocity agreement vehicles operating illegally in the state of non-domicile.

As long as the activities of the operator, licensed by Missouri, does not violate the laws of Missouri, there can be no cause for complaint. It is for Illinois to enforce the conformance of operators to their laws, and in order to do so the activity must occur within the State of Illinois. Admittedly, while an operator may have no legal right to operate in Illinois, it is up to Illinois to prevent the exercise of his power to do so. Briefly stated, the statutes of Missouri have no force relative to activities in Illinois, a fortiori, any agreement made pursuant thereto likewise is inapplicable to activities in Illinois.

The part of the reciprocity agreement quoted in your request is, we believe, a cover-all attempt to prevent the breach of Illinois laws concerning operations there. In other words, Illinois has agreed with Missouri that even though reciprocity as to licenses, fees and registration charges is in effect, such reciprocity does not per se invalidate other requirements of operation, for example: weight, length of trailer, axle requirements, and so on. The reciprocity agreement applies to license fees and registration, and does not waive general operational requirements.

CONCLUSION

Therefore, we believe that there is no authority for Missouri to demand that an operator of a commercial motor vehicle be licensed as a beyond-local operator when all of the beyond-

Col. Hugh H. Waggoner

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local activity takes place outside of the State of Missouri. Also, as to the activity outlined, the reciprocity agreement between Illinois and Missouri is inapplicable, only Illinois can govern activities occurring wholly within its jurisdiction, and, if as you state, there is no violation of Missouri laws, Missouri cannot complain as to what occurs in Illinois.

Respectfully submitted,

WILLIAM C. BLAIR
Assistant Attorney General

APPROVED:

J. E. TAYLOR *J.E.*
Attorney General

WCB:LR

MOTOR VEHICLES:

Self-propelled crane mounted on pneumatic tires, designed primarily for construction work, need not be registered as motor vehicle.

March 24, 1948



Mr. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Sir:

We have your letter of February 28, 1948, in which you request an opinion of this department. Your letter is as follows:

"We ask that your department give us an opinion on the question of licensing self-propelled construction equipment. The facts are as follows:

"A contractor has construction equipment which he may use on highway construction work but which is generally employed on private construction off the highway. Some of this equipment is mounted on pneumatic tires and is self-propelled. It is necessary to move it over the highway under its own power from one job to another.

"We would like to know if the equipment must be licensed in order to move it over the highways of our state. Also, we ask an opinion as to what type of license would be required for a self-propelled crane weighing approximately 46,000 pounds, if it is necessary to license such equipment as described above. Would such a vehicle, for the purpose of registration, be classed as a commercial motor vehicle or as a regular motor vehicle and the fee determined by the horsepower of the engine."

The chief question presented by your inquiry is whether the self-propelled crane, weighing approximately 46,000 pounds,

Mr. Hugh H. Waggoner

mounted on pneumatic tires, must be licensed in order to move on the state highways. A negative answer to this question would, of course, dispose of all other questions raised by your inquiry.

In reaching a conclusion upon this subject, it is necessary to consider whether the machine involved is a motor vehicle within the meaning of the statute. New Section 8367, Laws Mo. 1945, pp. 1195 and 1196, defines a motor vehicle as "any self-propelled vehicle not operated exclusively upon tracks, except farm tractors." If this machine is a vehicle, it comes within the above-mentioned statutory definition of a motor vehicle, but if it cannot be classed as a vehicle, it does not satisfy the requirements of said definition and, therefore, need not be registered under the terms and provisions of Sec. 8369, Laws Mo. 1945, p. 1197.

Section 8367, R. S. Ann., gives the following definition of a vehicle: "Any mechanical device on wheels, designed primarily for use on highways, except those propelled or drawn by human power or those used exclusively on tracks." We are of the opinion that the crane described in your letter, rather than having been designed primarily for use on highways, is, as a matter of fact, designed primarily for use in heavy construction work and is, therefore, neither a vehicle nor a motor vehicle within the meaning of the respective definitions above quoted.

CONCLUSION

We are accordingly of the opinion that the self-propelled crane described in your letter is not a motor vehicle within the meaning of Sec. 8369 R.S.A., and need not be registered or licensed.

Respectfully submitted,

SAMUEL M. WATSON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MOTOR VEHICLES:

Operator's duty, not manufacturer's, to see that motor vehicle is equipped with proper lights under Sec. 8386q, Mo. R. S. Ann.

April 29, 1948

Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri



Dear Sir:

We have received your request for an opinion of this department, which request is as follows:

"On November 4, 1947, Mr. William C. Cockrill, Assistant Attorney General wrote an opinion to this department relative to the red warning lighting and reflector requirements on commercial motor vehicles. It was Mr. Cockrill's opinion that every new commercial motor vehicle registered in the state of Missouri, when operated on the highway, is required to exhibit one rear lamp and two approved red reflectors in the rear as specified in Section 8386q, Revised Statutes Annotated.

"We would like to inquire further as to whether or not the manufacturer must meet these requirements or is it the responsibility of the person who operates the vehicle to see that the two red reflectors are mounted on the rear."

Section 8386q, Mo. R. S. Ann., reads as follows:

"Every motor vehicle and every motor drawn vehicle shall be equipped with at least one rear lamp, not less than fifteen inches or more than forty eight inches above the ground upon which the vehicle stands, which when lighted will exhibit a red light plainly visible from a distance of five hundred feet to the rear; provided, however, that such rear

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lamp may be mounted higher than forty eight inches on any vehicle carrying inflammable liquids as a cargo. Either such rear lamp or a separate lamp shall be so constructed and placed as to illuminate with a white light the rear registration marker and render it clearly legible from a distance of fifty feet to the rear. When the rear registration marker is illuminated by an electric lamp other than the required rear lamp, said two lamps shall be turned on or off only by the same control switch at all times. Every new passenger car and motor cycle registered in this State after January 1, 1942, when operated on a highway shall also carry at the rear, either as part of the rear lamp or separately, at least one approved red reflector, which shall be of such size and characteristics and so maintained as to be visible during the times when lighted lamps are required from all distances within three hundred feet to fifty feet from such vehicle when directly in front of a motor vehicle displaying lawful undimmed headlamps. Every new commercial motor vehicle, motor-drawn vehicle and omnibus with a capacity of more than six passengers registered in this State after January 1, 1942, when operated on a highway shall also carry at the rear at least two approved red reflectors, at least one at each side, so designed, mounted on the vehicle and maintained as to be visible during the times when lighted lamps are required from all distances within five hundred to fifty feet from such vehicle when directly in front of a motor vehicle displaying lawful undimmed headlamps. Every such reflector shall meet the requirements of this article and shall be mounted upon the vehicle at a height not to exceed sixty inches nor less than twenty-four inches above the surface upon which the vehicle stands."

This section is a portion of an act adopted by the 61st General Assembly, found in Laws Mo. 1941, p. 438.

Section 8386a of the act reads as follows:

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"Any person violating any of the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor. The term 'person' as used in this act shall mean and include any individual, association, joint stock company, co-partnership or corporation."

This is the only penalty provision in the act.

The regulation contained in Sec. 8386q is directed at the operation of a motor vehicle on the highways of this state, and the only penalty which could be invoked would be for the operation of a vehicle on the highways without the lights and reflectors specified in this section.

Inasmuch as there is no prohibition of the sale of a motor vehicle in this state, unless equipped in the manner set out in Sec. 8286q, no penalty could be imposed for the sale of a vehicle not so equipped. In this regard, the act differs from that requiring safety glass in motor vehicles, inasmuch as that act, Sec. 8390 Mo. R.S. Ann., prohibits the sale as well as the operation of a motor vehicle not properly equipped with safety glass.

CONCLUSION

It is the opinion of this department that the operator of a motor vehicle is required to see that the lighting equipment on said vehicle complies with requirements of Sec. 8386q, Mo. R.S. Ann., in that it is not the duty of the manufacturer to see that motor vehicles sold in this state are so equipped.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

COURTS:
SERVICE:

Witnesses must be served personally; service by telephone, etc., is not legal service.

June 2, 1948



Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This is in reply to your request of recent date for an opinion which reads as follows:

"Frequently the attorney for the plaintiff or defendant in a civil case will leave a subpoena at one of our Troop Headquarters for a member of the department or will telephone the Troop Headquarters that he has a subpoena for the officer to appear in Civil Court on a certain date. We request your opinion as to whether or not this constitutes legal service and if the Patrol is obligated to forward the subpoena to the officer or require the officer to appear in court in answer to a subpoena of which they have been informed by telephone."

Section 1908, R. S. Mo. 1939, provides as follows:

"The service of a subpoena to testify shall be by reading the same or delivering a copy thereof to the person to be summoned: Provided, that in all cases where the witness shall refuse to hear such subpoena read or to receive a copy thereof, the offer of the officer or other person to read the same or to deliver a copy thereof, and such refusal, shall be a sufficient service of such subpoena. The return shall show the manner of service; and in civil cases, if the witness reside at a greater distance than forty miles from the place of trial,

Colonel Hugh H. Waggoner

it shall be so stated in the return, and also whether his legal fees have been tendered or paid, and if served by an officer his return shall be conclusive of the facts therein stated; if served by a private person, the return shall be verified by affidavit, which shall be received as evidence, and such affidavit may be made before the sheriff of the county where such service is made."

We are unable to find a Missouri case wherein the first part of Section 1908, supra, has been construed.

In respect to the practice of leaving subpoenas at troop headquarters for patrolmen, we think that such service is insufficient. In the case of *Enos v. St. Louis and San Francisco Ry. Co.*, 41 Mo. App. 269, a statute providing for service on the plaintiffs was construed to mean service on the plaintiffs only and proper service could not be obtained by leaving the papers with an agent or attorney. Section 1908, supra, provides for service on the prospective witness and makes no provision for subpoenas being left with any other person or at the witness' place of employment or at his home.

We think that this statute contemplates personal service on the person who is to testify on the date set forth in the subpoena. We think this view is fortified by the language in the second part of Section 1908 which provides for a return showing the manner of service, if by an officer or by affidavit if served by a private person. A private person could not properly verify service when he would be without actual knowledge that the summons had come into the hands of the person named therein.

In the case of *Ex parte Terrell*, 95 S. W. 536, the court considered the proposition of service of a subpoena over the telephone. In the course of this opinion the court said, l.c. 537:

" * * * First, whether the service of a subpoena could be made over the telephone; and, second, concede that such service is authorized by our statute, judgment against applicant could not be made final in the first instance. When our statutes were passed on the subject of subpoenas and their service, it was before the invention of

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telephones - at least before their use in this state. Of course, the law originally contemplated personal service. The statute, in article 515, Code Cr. Proc. 1895, says: 'A subpoena is served by reading the same in the hearing of the witness, and the officer having the subpoena shall make due return thereof,' etc. There are other statutes in connection with this showing that the officer is entitled to fees for service, and certain fees for mileage traveled in making the service. Indeed, all of our statutes on this subject appear to contemplate a personal service, not only by reading the process in the hearing but in the presence of the witness. However, it is urged that service by phone is within the letter and spirit of our statutes on the subject of serving process. If this were clearly true, then the law might be applied to the new invention, or the new invention applied to the law. But we do not think so. In such case service by phone, the party served being without the view, could only be identified by the voice of the party on whom the service should be made, and this could only apply to but few cases, only to such as the officer making the service could know and recognize the voice, and this would be a rather unsatisfactory method of identification at best. The best means of identification would be recognition of the person on whom the service was made; such recognition based on personal view of the witness by the officer. Accordingly we hold that service by phone is not contemplated or embraced within our statutes on the subject of service of subpoena by an officer on a witness. *Clay v. State*, 40 Tex. Cr. R. 593, 51 S.E. 370; *Tooney v. State*, 5 Tex. App. 187; *Sullivan v. First Nat'l. Bank* (Tex. Civ. App.) 83 S. W. 421. None of these cases are exactly in point, but they are illustrative of the question here before the court."

We are of the opinion that the view taken by the Texas Court is the correct one and that personal service furnishes

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the only satisfactory method of knowing that service has been had on the person named in the subpoena.

Sections 1903-1905, R. S. Mo. 1939, provide for various penalties for nonattendance and means of enforcing attendance of a person summoned as a witness in a cause. In order to insure attendance of desired witnesses and respect for the summons of courts, together with protection to the person being summoned, we think it proper to view the statute providing for service to mean personal service upon the individual. This opinion is limited to service of subpoenas out of a court of record in this state.

CONCLUSION

It is the opinion of this department that service on a patrolman by leaving a subpoena at troop headquarters, or by telephone to the patrolman, is not legal service as contemplated by Section 1908, R. S. Mo. 1939.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

CONSTITUTIONAL LAW: penalty assessment plan for motor
HIGHWAY PATROL: vehicle violation would be
MOTOR VEHICLES: unconstitutional.

FILED

93

September 15, 1948

9-17

Col. Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Col. Waggoner:

This is in reply to your letter of recent date requesting an opinion from this department, which reads, in part, as follows:

"The State of Colorado has a system of penalty assessment on motor vehicle violations. We believe that such a system in the State of Missouri would be very helpful to this department in enabling more efficient regulation of traffic on our highways and permitting law enforcement in the State of Missouri to better curb the violator who repeatedly operates his vehicle in a careless and reckless manner. Such a system would materially lighten the load of our Magistrates, some of whom already have more cases than they can conveniently handle.

"The Patrol would like to get members of the legislature to introduce a similar bill at the next session of the assembly, but there is some question as to its constitutionality in our state. Therefore, we request that if it is not against the policy of your department you give us an opinion as to its constitutionality. We feel that this system would not only be a help to us and the Magistrates of Missouri but that it would be wholeheartedly accepted by the public. Of course, many of the municipalities in this state now use a similar penalty assessment plan."

The penalty assessment system in operation in the State of Colorado is evidently a plan whereby members of the State Highway Patrol are authorized, in certain cases, to assess an appropriate fine upon the arrest of a person violating any provisions of the law relating to motor vehicles and highways which constitute a misdemeanor. A list of the various offenses and the uniform penalty to be assessed for the violation thereof is compiled and set out in the statute. Additional uniform penalties are provided for further violations which occur in a specified period of time. This plan is administered in the following manner:

At the discretion of the arresting officer, the arresting officer may give notice at the time of the arrest to the person in charge of or operating such motor vehicle which notice shall be in the form of a penalty assessment for any misdemeanor specified by statute. Provided, however, that the person in charge of said motor vehicle or who appears to be guilty of such misdemeanor elects forthwith and at the time of such arrest to accept and agree to pay such penalty assessment in lieu of further proceeding or defense against such misdemeanor charge in court. Acceptance and payment of the prescribed penalty assessment set forth by statute shall be deemed a complete satisfaction for the violation and the violator shall be given a receipt which so states. Such penalty assessment in the amount specified by statute must be paid at the office of the supervisor of the motor vehicle department either in person or by registered mail within five days from the date of the arrest. If such penalty assessment be not so paid said violator shall be proceeded against as by law provided for a violation of this article for misdemeanors and such violator shall be subject to all fines, jail sentences or other penalties set forth in this article and more especially as set forth by statute if and when such violator is found guilty of a misdemeanor by a court of competent jurisdiction. The notice specified by statute shall be construed to be a summons as for a charge of a misdemeanor under this article in the event that the violator

fails or refuses to pay the penalty assessment herein prescribed within five days from the date of the arrest to the supervisor of the motor vehicle department and such notice shall be in such form as prescribed by law and to conform with this act so as to show the nature of the charge and the venue of the court in which such charge shall be heard in the event that the penalty assessment prescribed herein is not paid and the prosecution as for misdemeanor shall be thereafter heard in such court. In the event that a prosecution be had hereunder the violator shall be privileged to answer the charge made against him in the manner and within the time and subject to the other provisions of this article relating to prosecution for misdemeanors.

A plan such as that proposed would, in effect, amount to the summary charging, convicting and punishing of persons for certain crimes by an arresting officer. It is provided in Article I, Section 17 of the Missouri Constitution, 1945, that no person shall be prosecuted criminally for a misdemeanor otherwise than by indictment or information. Said provision reads:

"That no person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies, but this shall not be applied to cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger, nor to prevent arrests and preliminary examination in any criminal case."

The above constitutional provision is implemented with regard to misdemeanors in the magistrate court in the Laws of Missouri, 1945, page 750, Sections 2 and 3. Said Sections 2 and 3 provide, in part, as follows:

"Prosecutions before magistrates for misdemeanors shall be by information, which shall set forth the offense in plain and concise language, with the name of the person or persons charged therewith: * * *"

"All such informations shall be made by the prosecuting attorney of the county in which the offense may be prosecuted, under his oath of office, and shall be filed with the magistrate as soon as practicable, and before the party or parties accused shall be put upon their trial, or required to answer the charge for which they may be held in custody: * * *"

Further, it has been held by the Supreme Court of Missouri in the case of State v. McKinley, 111 S.W. (2d) 115, that there can be no trial, conviction or punishment for a crime without a formal accusation. The court said, at page 118:

"There being no information in the case after the plea in abatement was sustained, the court was without jurisdiction to try the appellant on the charge of attempted burglary. Section 12, article 2 of the State Constitution provides: 'No person shall be prosecuted criminally for felony or misdemeanor otherwise than by indictment or information, which shall be concurrent remedies.' It is fundamental law that: 'There can be no trial, conviction or punishment for a crime without a formal and sufficient accusation.' 31 C. J. Sec. 1, p. 559, Sec. 152, p. 638; 14 R.C.L. Sec. 2, p. 152. * * *"

The administration of said proposed plan would invest judicial discretion in members of the Highway Patrol. The Highway Patrol would be allowed to inflict punishment for the violation of a crime in an arbitrary manner without the benefit of formal procedure to insure the rights and safety of the offender. The duties and functions of the courts and prosecuting attorneys in this matter are definitely and specifically set out and must be performed in strict compliance with the law. These duties and functions cannot be delegated in the manner proposed. The constitutional guaranty of such offenders must be preserved. Such a plan cannot be countenanced in view of the Constitution and other provisions of the law.

With regard to the fact that many municipalities in this state now use similar penalty assessment plans, it is sufficient to say that the above constitutional provision has no application in those cases for the reason that the violation of a city

Col. Hugh H. Waggoner

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ordinance is not the commission of a crime. Prosecutions for such offenses are not criminal in nature. Ex parte Lewis, 328 Mo. 843, 848; Ex parte Hollwedell, 74 Mo. 395, l.c. 400 and 401.

Conclusion.

It is the opinion of this office that a penalty assessment plan applicable to motor vehicle violations constituting misdemeanors would be unconstitutional under the provisions of the Missouri Constitution.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JB

DD:ml

Enc.

MOTOR VEHICLES: Proof of financial responsibility must be maintained in the future.

November 5, 1948

FILED

93

Col. Hugh H. Waggoner, Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This is in reply to your letter of recent date requesting an opinion of this department and reading in part as follows:

"We request your opinion as to whether or not a person whose driver's license has been revoked or suspended must show financial responsibility before the license is reinstated and must this financial responsibility be maintained thereafter until he no longer operates a motor vehicle on the highways of this state."

The Motor Vehicle Safety Responsibility Act, Laws of Missouri, 1945, page 1207, Section 3(a), reads as follows:

"Whenever the Commissioner, under any law of this State, suspends or revokes the license of any person upon receiving record of a conviction of such person of any offense requiring such suspension or revocation, or of a forfeiture of bail or collateral deposited to secure an appearance for trial for such offense, the Commissioner shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles register by such person."

Section 3 further provides in subsections (b), (c) and (d):

"(b) Such license and registration shall remain suspended or revoked and shall not

at any time thereafter be renewed nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such person until permitted under the Motor Vehicle Laws of this State, and not then unless and until such person shall give and thereafter maintain proof of financial responsibility.

"(c) If a person is not licensed, but by final order or judgment is convicted of any offense requiring suspension or revocation of license, or forfeits any bail or collateral deposited to secure an appearance for trial for any such offense, or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person, and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person, until he shall give and thereafter maintain proof of financial responsibility.

"(d) Whenever the Commissioner suspends or revokes a non-resident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility."

It will be noted that whenever a license has been suspended or revoked it will not be renewed unless and until the licensee gives proof of financial responsibility. The further condition of such renewal is that said licensee shall also thereafter maintain proof of financial responsibility. The intent of the Legislature is of primary concern in the construction of statutes. The evident intent of the Legislature in this case requires that a license cannot be renewed unless and until the licensee not only gives proof of financial responsibility but maintains such proof in the future. This conclusion is strengthened by the provisions of Section 5 of said act, which is in part as follows:

"(a) The suspensions required in Section 4 shall remain in effect and no other motor vehicle shall be registered in the name of such judgment debtor nor any new license issued to such person for the vehicle involved unless and until such judgment is satisfied or stayed and the judgment debtor gives proof of financial responsibility in future, as hereinafter provided, except under the conditions as herein stated in the next succeeding sections."

(Underscoring ours.)

The wording of the foregoing provisions regarding proof of financial responsibility in the future is plain and unambiguous and under the well settled rules of statutory construction must be given effect as written.

CONCLUSION

Therefore, it is the opinion of this department that under the provisions of the Motor Vehicle Safety Responsibility Act, Laws of Missouri, 1945, page 1207, proof of financial responsibility must be maintained in the future by a licensee after the renewal of a previously suspended or revoked driver's license.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

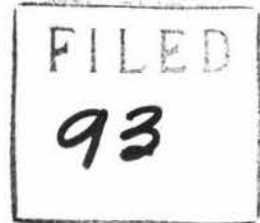
J. E. TAYLOR
Attorney General *JB*

DD:VLM

STATE HIGHWAY PATROL:
CORONERS:

Coroner not authorized to issue blanket order requiring state patrol to leave dead bodies at scene of accident until his arrival.

December 15, 1948



Colonel Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Jefferson City, Missouri

Dear Colonel Waggoner:

This is in reply to your letter of recent date requesting an opinion of this department and reading as follows:

"In connection with our duties in the handling of accidents, tornados, and other similar occurrences, we are many times confronted with the problem of making proper disposition of bodies in those cases where there are fatalities.

"We shall appreciate an opinion from your department as to whether under the present law, a police officer when called to the scene of such a tragedy is required to keep the body or bodies at the scene until such time as the coroner may arrive. We are aware of the provisions of Section 13231, page 990, of the 1945 Session Acts, and would like your interpretation as to where the inquest should be held.

"Under this section, would a coroner, who may also be an undertaker, be authorized to issue blanket instructions that all bodies be left at the scene until such time as he arrives and directs final disposition?"

The office of coroner was created by the Laws of Missouri, 1945, page 1404, Section 1. Being a statutory officer the coroner can exercise only such powers as are specifically prescribed by the acts of the Legislature. The rule is set out in 46 C.J., Officers, Sec. 287, page 1031 as follows:

"The powers and authority of public officers are fixed and determined by the law. Subject to such limitations as may be imposed by the constitution, the legislature with power to create an office may prescribe its powers, and may from time to time increase or diminish them. * * * *"

The above rule is recognized in Lamar Township vs. City of Lamar, 261 Mo. 171, l.c. 189 and is as follows:

"Officers are creatures of the law, whose duties are usually fully provided for by statute. In a way they are agents, but they are never general agents, in the sense that they are hampered by neither custom nor law and in the sense that they are absolutely free to follow their own volition. * * * They are trustees as to the public money which comes to their hands. The rules which govern this trust are the law pursuant to which the money is paid to them, and the law by which they in turn pay it out. * * * The law which fixes his duties is his power of attorney; if he neglect to follow it, his cestui que trust ought not to suffer. In fact, public policy requires that all officers be required to perform their duties within the strict limits of their legal authority."

This rule is also followed in the Missouri case of Charles E. Anthony v. County of Jasper, 101 U.S. 693, 25 L.Ed 1005, where the court said at page 1008:

"The authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted; and he cannot bind his principal under powers that have been taken away, by simply antedating his contracts. * * *

Section 13231, Mo. R. S. A. Laws of Missouri, 1945, page 990, relating to the duties of coroners in the case of death by violence, prescribes as follows:

"Every coroner, so soon as he shall be notified of the dead body of any person, supposed to have come to

his death by violence or casualty, being found within his county, shall make out his warrant, directed to the sheriff of the county where the dead body is found, requiring him forthwith to summon a jury of six good and lawful citizens of the county, to appear before such coroner, at the time and place in his warrant expressed, and to inquire, upon a view of the body of the person there lying dead, how and by whom he came to his death."

It is clear from a reading of the above section, as well as other sections contained in chapter 91, R. S. Mo. 1939, as amended, applicable to the office of coroner, that the statutes make no provision or direction that a dead body be left at the scene of an accident or similar occurrence until a coroner's jury is summoned and an inquest held at that place, but said statutes provide that when the coroner is notified that a person has come to his death by violence or casualty he shall make out a warrant in which is directed the time and place of the inquest. The law does not contemplate that the dead body be retained at the scene of the accident or similar occurrence until and at such time as an inquest can be held at that place.

The rule is found in 13 Corpus Juris, Coroners, Section 16, page 1248, as follows:

"An inquest is properly held in the territory of the coroner in whose jurisdiction the body is found, without regard to where the death occurred or where the injury was received. * * * *"

See also 18 Corpus Juris Secundum, Coroners, Section 16, page 296.

Thus it necessarily follows that a coroner does not have the authority under the existing statutes to issue blanket instructions that all dead bodies be left at the scene of the accident or similar occurrence until such time as the coroner arrives and directs final disposition of the body.

CONCLUSION

Therefore, in view of the foregoing, it is the opinion of this department that a coroner does not have authority to issue blanket instructions to members of the state highway patrol that all dead bodies be left at the scene of an accident or similar occurrence

Colonel Hugh H. Waggoner

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until the coroner arrives and directs final disposition of the body.

Respectfully submitted,

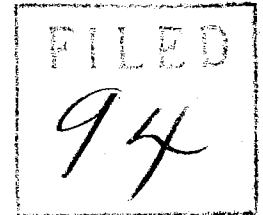
DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

MAGISTRATE COURTS: Where defendants are charged and tried jointly in the magistrate court, separate
CRIMINAL COSTS: prosecuting attorney's fees are chargeable, but only one set of clerk's fees is chargeable.

April 2, 1948



4-16

Honorable H. Glenn Weber
Judge of the Magistrate Court
Jefferson County
Hillsboro, Missouri

Dear Judge Weber:

This is in reply to your letter of recent date requesting the opinion of this department on the following question:

"Where two or more defendants are charged jointly in the same information and tried together for any alleged offense and found guilty or enter a plea, are full clerk's and Prosecuting Attorney's fees chargeable against the individual defendants as if charged and tried separately or does one set of fees apply to all defendants to the action?"

An analogous situation was presented in the case of In the Matter of Jerry Murphy and Jerry Spillane, 22 Mo. App. 476, decided by the St. Louis Court of Appeals. The facts there were as follows:

"* * * They were jointly proceeded against by information for a misdemeanor, before a justice of the peace, were jointly tried before a jury, jointly convicted, and adjudged to pay a fine of twenty-five dollars and costs. They paid the fine and what they were advised were all the costs, including a single fee of five dollars for the prosecuting attorney. The justice of the peace had taxed a fee of ten dollars for the prosecuting attorney, or a fee of five dollars in respect of each defendant; and for the non-payment of the remaining five dollars,

he issued his warrant of commitment, under which the petitioners are now held. * * *

The court made the following statement at pages 477 and 478:

"The question depends upon the meaning of the following clause in section 5596, of the Revised Statutes, prescribing the fees of prosecuting attorneys: 'For convictions in the circuit court, upon indictment, when the punishment assessed by the court, or jury, or justice, shall be fine, or imprisonment in the county jail, or both such fine and imprisonment, \$5.00.' The question in the narrowest form of statement is, whether the word 'conviction' in the above clause is to be interpreted as meaning a judgment, in favor of the state, in a criminal case, upon the merits, irrespective of the number of defendants against whom it is jointly rendered, or such a judgment in its operation against each of several defendants, rendered upon a single information, and after a single trial.

"I am of opinion that the former is the correct view of the meaning of the statute. * * *

The court held there at page 479:

" * * * The question clearly appears to be whether there was more than one prosecution, one trial, one verdict, one judgment. If there was, then the prosecuting attorney is entitled to a separate fee in each case; if there was not, then he is entitled to but one fee."

The Spillane case was decided in 1886. The following year the Legislature amended Section 5596 by expressly providing that prosecuting attorneys shall be allowed a fee for the conviction of every defendant. Section 5596, as amended, reads, in part, as follows:

" * * * for the conviction of every defendant in the circuit court, upon indictment or information, or before a justice of the peace, upon information, when the punishment assessed by the court or jury or justice shall be fine or imprisonment in the county jail, or by both such fine and imprisonment, five dollars; for the conviction of every defendant in any case where the punishment assessed shall be by confinement in the penitentiary, except in cases of rape, arson, burglary, robbery, forgery or counterfeiting, ten dollars; for the conviction of every defendant of homicide, other than capital, or for offenses excepted in the last clause, twelve dollars and fifty cents; for the conviction of every defendant in a capital case, twenty-five dollars; for his services in all actions which it is or shall be made his duty, by law, to prosecute or defend, five dollars. * * *

(The above portion of Section 5596, Laws of Missouri, 1837, page 188, is embodied in substantially the same form in Section 13405, R.S. Mo. 1939.)

The amendment of 1887 was obviously enacted in the light of the Spillane decision and intended to entitle prosecuting attorneys to a fee for the conviction of every defendant rather than limiting them to such fee for each conviction regardless of how many defendants were joined in the prosecution.

However, we believe that the rule set out in the Spillane case is controlling on the question of clerk fees. It was further held in the case at page 480:

" * * * the statute contemplates the payment of fees for actual services only. The payment of fees beyond this is illegal and is to be discountenanced. An officer who makes a journey to serve a writ upon two defendants at the same place is entitled to mileage in but one case, unless the statute provides otherwise, because he has performed but one journey. A clerk of a court of record, who enters a judgment against several

defendants is entitled to but one fee,
because he has performed but one act of
service. * * *

The situation under consideration involves only one information, one trial, one verdict and one judgment, and presents a clear case under the above authority. Any reasoning which entitles the clerk to a duplication of fees would entitle the jury to double fees for serving at the trial and would allow witnesses more than one fee for testifying at the trial, all of which is clearly prohibited by law. The fees allowed clerks of courts possessing criminal jurisdiction for their services in criminal proceedings are provided in Section 13409, R.S. Mo. 1939. The terminology of that statute clearly entitles the clerk to only one fee for every indictment returned by a grand jury, one fee for taking and entering each verdict and one fee for entering a judgment. It is well settled that statutes relating to court costs must be strictly construed.

The foregoing statutes and authorities are, of course, equally as applicable to magistrate courts as to circuit courts.

Conclusion.

Therefore, it is the opinion of this department that where two or more defendants are charged jointly by the same information for a criminal offense in the magistrate court, and are tried together and found guilty or enter a plea together, the same fees are chargeable against said defendants jointly for the services of the clerk of the magistrate court as are chargeable against an individual defendant under the same circumstances. However, in such case separate fees for the services of the prosecuting attorney are chargeable to each defendant.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

T.B.

DD:ml

DRAINAGE DISTRICTS:

County court drainage districts liable for construction of or replacement of a collapsed bridge over one of it's ditches.

February 14, 1948



Mr. Joe C. Welborn
Prosecuting Attorney
Stoddard County
Bloomfield, Missouri

Dear Mr. Welborn:

This will acknowledge receipt of your letter of February 14, 1948, in which you request an opinion of this department. Omitting caption and signature, your letter is as follows:

"It has become necessary for a new bridge to be constructed over a drainage ditch of a district formed by the County Court. This necessity has arisen by reason of the fact that the present bridge has collapsed. The question arises as to whether it is the duty of the township, (Stoddard County being a county with township organization), the drainage district, or the County Court to rebuild the bridge.

"So far as I can tell, the law is somewhat confused on the subject.

"The Supreme Court has ruled that it is the duty of Circuit Court Drainage Districts to build bridges across their ditches and to maintain them until they are declared sufficient by the county court. State ex rel Medicine Creek D.D., 224 S.W. 343 and State ex rel vs Big Medicine Drainage District, 196 S.W. 2nd 254. They base these rulings on Section 12354, R.S. 1939.

"This section, 12354 is pretty much similar to 12427, in the article pertaining to county court Drainage Districts. The Supreme

Mr. Joe C. Welborn

Court seems to base their conclusion that the drainage district is liable under 12354 on the language:

'Within ten days after a dredge boat or any other excavating machine shall have completed a ditch across any public highway, a bridge adjudged sufficient by the County Court of said County or Counties shall be constructed over such drainage ditch where the same crosses such highway . . . '

"There is no such provision in Section 12427. On the contrary, there is this provision:

'The County Court, may, when the same is necessary--.. cause to be constructed or enlarged, any bridge or culvert made necessary by the crossing of any ditch constructed by a district organized under the provisions of this article.'

"Apparently, this refers to the County Court, as the governing body of the Drainage District.

"I am aware of the holding in Camden Special Road District et al vs Willow Drainage District, 199 S. W. 716, which holds that a County Court Drainage District must replace a washed out bridge. However, the ruling in that case is based on Section 5564, of the Revised Statutes of 1909, which section was replaced in 1929 and I find no similar section in the present law.

"It will cost considerably more than \$100.00 to replace the bridge, so we are confronted with Section 8824, and 8825 in so far as liability of the township is concerned.

"The County Court has never adjudged this bridge sufficient, so far as I have been able to determine. The bridge collapsed from a heavy load, not from a washout.

Mr. Joe C. Welborn

"I would appreciate an official opinion from you as to the agency liable for replacing the bridge."

In answering your inquiry it is necessary that we deal with two types of drainage districts; those organized as a result of a petition filed in circuit court and districts organized by the county courts. The drainage district about which you inquire, was, according to your letter organized by the county court of your county, and therefore, we must deal primarily with the statutes and decisions referring to that particular type of district.

The authority of the county courts of the various counties to organize, incorporate, and establish drainage districts is conferred by Section 12398, Mo. Revised Statutes Annotated, which provides as follows:

"When it shall be conducive to the public health, convenience or public welfare, or when it will be of public utility or benefit, the county court of any county in this state shall have the authority to organize, incorporate and establish, drainage districts and to cause to be constructed, straightened, widened, altered or deepened, any ditch, drain, natural stream--not navigable, bank protection, current control, or watercourse, when the same is necessary to drain or protect any land or other property. The word 'ditch' as used in this article shall be held to include a drain, watercourse, bank protection, current control or levee or any drain, watercourse, bank protection, current control or levee hereafter constructed. The petition for any such improvement shall be held to include any side, lateral, spur, or branch, ditch, drain, watercourse, or levee, the lowering of any lake, the protection of the banks of an adjacent stream from wash, cutting or erosion or any other work necessary to secure fully the object of the improvement petitioned for, whether the same is mentioned in such petition or not: PROVIDED, that in the event any work is to be done upon any navigable stream, the consent of the federal government shall be obtained to make such improvement or improvements

Mr. Joe C. Welborn

before the actual work on the improvement shall be begun."

The question to be settled is what agency shall reconstruct a collapsed bridge across one of the ditches of the district. There are three possibilities according to your letter. They are, (1) the township (your county having township organization, (2) the drainage district itself, or (3) the county court.

Reserving comment on any liability of the part of the township until later in the opinion, we will first consider the other two possibilities. The county court occupies a peculiar position relative to drainage districts which they form. Such districts like those formed in circuit courts are public corporations. See *Graves vs Little Tarkio D.D.* 134 SW (2) 70, 345 Mo. 557; *Thompson vs City of Malden*, 118 SW 1059. As can be seen from reading the *Thompson* case, supra, the county courts have charge of the drainage districts which they form. In said case, the court said:

"The County Court Drainage Districts, as shown above, are public corporations, and are subject to the administration by the County Courts in which they are organized
*****."

Also see *Drainage District #23 vs Hetlage*, 102 SW (2) 702, 231 Mo app 355.

The county courts are given authority to construct bridges across ditches constructed by county court drainage ditches under Section 12427, Missouri Statutes Annotated. Said section of the statute provides, in part, as follows:

"The County Court may, when the same is necessary for the public health, convenience or welfare, cause to be constructed or enlarged any bridge or culvert made necessary by the crossing of any ditch constructed by a district organized under the provisions of this article: PROVIDED, HOWEVER, that if such bridge or culvert shall belong to any corporation other than the county, the county clerk shall give such corporation notice by delivering to its agent the order of the court declaring the necessity for constructing or enlarging such bridge or culvert. A failure to

Mr. Joe C. Welborn

construct or enlarge such bridge or culvert within the time specified shall be taken as a refusal to do said work, and thereupon the county court shall proceed to let the work of constructing or enlarging the same, and assess the corporation with the cost thereof, the county clerk shall place such assessment on the tax book against said corporation, to be collected as taxes. But before the county court shall let such work, they shall give to the agent of such corporation at least twenty days' actual notice of the time and place of letting such work,*****."

It will be seen from the above that the county court of the various counties have control over construction of bridges over the ditches constructed by county court drainage districts. Therefore, all that is required to be done, is for the county court to determine if a bridge is necessary for the public health, convenience or welfare, and if so, then, order the corporation responsible for the construction or upkeep to construct or reconstruct such bridge. If such order is not complied with, then the county court may proceed to let the work of constructing such bridge and assess the cost against the corporation responsible for the work.

The courts of this state have on several occasions, passed on the responsibility for the construction of bridges across county court drainage districts. The first case to pass directly on this point was Camden Special Road District et al vs Willow Drainage District 199 SW 716, (Mo. app). The defendant in this case was a drainage district incorporated in the county court of Ray County. The Court of Appeals said:

"***** and, since we have seen that legislative authority is granted in the instance of the county court districts, to the district itself to build bridges where the drain crosses a public highway, and since the crossing by such drain is the destruction of the right of the public in the highway (citing case), it should follow that the district may be compelled to perform that act which it is authorized to perform which will restore the public use."

Again in the case of State ex rel vs Medicine Creek, D.D. 224 SW 343, 1.c. 345, 284 Mo. 636, the Supreme Court, in speaking of a drainage district organized in a circuit court stated the following:

Mr. Joe C. Welborn

"Since the counties are not required to build these bridges the drainage districts must do so. Furthermore, it seems essentially just that the burden of building bridges made necessary by the digging of drainage district, should be borne by drainage district. Drainage Districts are in a sense public enterprises, and they have, very properly, been greatly encouraged in this state; but in the last analysis the benefits which flow from them are chiefly enjoyed by those who own the lands which the ditches drain."

The decision in the case of Camden Special Road District vs Willow Drainage District, supra was apparently based on Section 5564, Revised Statutes of Missouri, 1909. This section of the statute which related to county court drainage districts, provided that the three commissioners appointed by the county court to oversee construction, had the power to do any and all acts necessary in constructing and repairing all the property of the drainage district which included bridges.

As stated in your request, this statute, after having been reenacted in 1919, was repealed by the laws of 1929 at #177. However, since that time, the principle that the drainage district should construct and maintain the bridges, has been set out in other cases. In 1931, the case of Cunningham Realty Company vs Drainage District #6 of Pemisnot County, 40 SW (2) 1086, 226 Mo. app. 1, was decided by the Springfield Court of Appeals. In speaking of the question of the upkeep of bridges in county court drainage districts that court said:

"It was the duty of the district to maintain them."

This point was again passed on in the case of Graves vs Little Tarkio D.D. #1, 134 SW (2) 1.c. 79, 345 Mo. 557, when the Supreme Court of Missouri stated as follows:

"The fact that drainage districts have been required to build and maintain bridges where their ditches cross public highways, whether such cost was provided for in their original plans or not, would also indicate that the district is not without authority to incur indebtedness in excess of maximum annual maintenance income. These duties and obligations are not based on assets or income."

Mr. Joe C. Welborn

State ex rel Chamberlin v. Grand River
Drainage District, 311 Mo. 309, 326, 331,
278 S.W. 388, 393, 395; State ex rel. Ashby
v. Medicine Creek Drainage District, 284
Mo. 636, 654, 224 S.W. 343, 346. The same
is true of County Court Drainage District.
Camden Special Road District v. Willow Drain-
age District, Mo. App., 199 S.W. 2nd 716;
Cunningham Realty Co. vs. Drainage District
No. 6, 226 Mo. App. 1, 22 40 S.W. 2nd 1086,
1097."

In view of the above decisions, this department feels that it is the duty of county court drainage districts to construct and maintain bridges across its ditches whether they need repairs or reconstruction. It will be a very simple matter for the county court, as the administrative body controlling a drainage district to order a bridge reconstruction.

Our views as above stated will dispose of any possibility of there being liability on the part of the township.

CONCLUSION

Therefore, it is the opinion of this department, that where a bridge has collapsed over ditch dug by a county court drainage district, it is the duty of such drainage district to replace it.

Respectfully submitted,

JOHN S. PHILLIPS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

copy to Mr. [unclear] 8/25

COUNTY BOARD OF EDUCATION: School board members and nonmembers both eligible to serve on county board of education.

COMMON SCHOOL DISTRICT: Board of directors cannot levy tax of sixty-five cents solely for building purposes without voter approval.

August 4, 1948

8.5

FILED
95

Honorable H. L. C. Weier
Prosecuting Attorney
Jefferson County
Festus, Missouri

Dear Mr. Weier:

This is in reply to your letter of recent date presenting two questions for the consideration and opinion of this department. Your letter is as follows:

"The County Superintendent of Schools has requested that I obtain your opinion with regard to two questions. The first question is whether non-school board members are eligible to serve on the County Board of Education under Senate Bill 307, or do such members have to be School District Board members. The second question has to do with whether a common school board has a right to levy a tax of \$.65 on the \$100 valuation for building purposes without the consent of the voters of the school district at the annual meeting."

In answer to your first question, your attention is directed to Section 1 of Senate Bill No. 307 of the 64th General Assembly, which provides for the creation and duties of a county board of education in each county. Section 1 first provides that the county superintendent of schools shall call a meeting of the members of the boards of education and boards of directors of the various school districts in the county who shall proceed to elect a county board of education consisting of six members, and then provides: "Each person so elected shall be a citizen of the United States and of the State of Missouri, a resident householder of the county, and shall be not less than twenty-four years of age." Further provision is then made concerning residence requirements.

The above-quoted provision sets out the only qualifications required of members of the county board of education. Nowhere in that provision, or in the act as a whole, do we find requirements as to further qualifications of such members. From this we must infer that the qualifications provided for are the only ones intended by the Legislature. The statute is plain and unambiguous, and under the familiar rules of statutory construction in such cases must be given effect as written.

Therefore, both members of the boards of education and boards of directors of the various school districts, and persons who are not members of such boards, are eligible for election to the county board of education, providing they possess the statutory qualifications.

Your second inquiry presents a question concerning the authority of the board of directors of a common school district to levy a tax of sixty-five cents on the hundred dollars assessed valuation for building purposes without voter approval.

Article X, Section 11(b) of the Constitution, limits the tax rate which may be imposed by a school district of the class under consideration to sixty-five cents on the hundred dollars assessed valuation. Section 10347, Laws of 1945, page 1629, implements, in part, that constitutional provision.

It will be noted that Section 10366, Laws of 1945, pages 893-896, allows school moneys received by a school district to be disbursed for the purposes for which they were levied, collected and received, and that certain funds are set up for the accounting of all school moneys, among which is a "Building Fund" for the furnishing, repair or erection of a schoolhouse in the district.

We believe it evident that the tax which is levied by a school district without voter approval, and within the constitutional limitation, is for all school district purposes including building purposes. Under no theory could an additional tax of sixty-five cents on the hundred dollars assessed valuation be levied without voter approval solely for building purposes within the school district, as such levy would be in direct contravention of the constitutional limitation.

If that portion of the moneys received by a school district, which is allotted for building purposes, is not sufficient for that purpose, a procedure is set out in the Constitution and statutes whereby the tax levied for district purposes

without voter approval can be increased for a period of four years.

Conclusion.

Therefore, it is the opinion of this department that both members of the boards of education and boards of directors of the various school districts in a county, and persons who are not members of such boards, are eligible for election to the county board of education.

It is further the opinion of this department that the board of directors of a common school district cannot levy without voter approval a tax of sixty-five cents on the hundred dollars assessed valuation solely for building purposes in addition to the tax levied for all school district purposes within the limitation imposed by the Constitution.

Respectfully submitted,

DAVID DONNELLY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JTB

DD:ml

ELECTIONS: Duty of Judge to assist illiterate voter.

October 14, 1948

FILED

95

Honorable Joe C. Welborn
Prosecuting Attorney
Bloomfield, Missouri

10-15

Dear Sir:

We have received your request for an opinion of this department which request is as follows:

"At the recent primary election certain illiterate voters attempted to vote with the assistance of marked sample ballots. These ballots were in a generally similar form to the official ballots. The ballots had been marked and the voters took the ballots to the election judges, told the judges they were illiterate, and told the judges they desired to vote according to the way that the ballot was marked.

"In one particular precinct two of the judges refused to assist the voters and informed the voters that they could not use the marked ballots. The judges proceeded to call the names of the various candidates off to the voters and required the voters to speak back to the judges, the names of the persons for whom he wished to vote. In several instances, the voter stated that he wanted to vote according to the way his sample ballot was marked, but the judge refused to look at the same ballot, and refused to let the voter use the sample ballot. In at least one instance, an illiterate voter, because he was not permitted to use his sample ballot, refused to vote, and because he insisted upon using his sample ballot was prevented from voting by the judges.

"Previous to the date of the election, I had prepared a

written opinion stating that the judges should help the voters to vote and to permit them to use the sample ballot, if they so desired, or to use any other memorandum or card which they desired in preparing their ballots.

"I would like to know whether or not the judges, by their action in preventing the voters from using the sample ballots, and particularly in the case where the voter was prevented from voting entirely, have committed a misdemeanor and whether or not the judges would be liable for prosecution for their action."

Section 11606, R. S. Mo. 1939, provides as follows:

"Any elector who declares under oath to the judges of election having charge of the ballot that he cannot read or write, or that by reason of physical disability he is unable to mark his ballot, may declare his choice of candidates to the judges having charge of the ballots, who, in the presence of the elector, shall prepare the ballot for voting in the manner hereinbefore provided: Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate."

The Supreme Court of this state has held on several occasions that election laws are to be construed liberally in aid of the right of suffrage. See *Nance v. Kearbey*, 251 Mo. 374, 158 S.W. 629; *Gramling v. Lawrence*, 353 Mo. 1028, 185 S.W.(2d) 818. The section in question was so construed by the Supreme Court in the case of *Hope v. Flentge*, 140 Mo. 390, 41 S.W. 1002. In that case the court was considering the effect of the failure on the part of the judges to require the oath specified in the section above quoted and also the effect of a judge's entering the voting booth with a voter. Speaking on this question, the court said (140 Mo., l.c. 403-405):

"It will be observed that the notice of counter contest nowhere charges that the electors named therein fraudulently accepted assistance without having previously taken the required oath nor that as a matter of fact they could read or write

or were not so disabled they could not mark their ballots. We are asked to hold that the failure of the judges to require such a preliminary oath shall disfranchise the ignorant voter whose illiteracy compels him to call upon them for assistance. Though too ignorant to mark out his own ballot, he is required to instruct the judges in their duties by insisting they must first administer the oath to him. While this statute requires the judges to assist any elector who declares under oath that he can not read or write, it does not say they shall not assist others that they know of their own knowledge can not read or write. Such cases must often occur, and while the judges should require the oath if they are doubtful of the elector's inability, still it would be a harsh construction to rule that they were guilty of conduct which should disfranchise the voter if they failed to require such oath when they well know he could neither read nor write. When it is remembered that our election judges are required to be chosen from the opposing political parties and our precincts are small, the opportunities for fraud in a voter thus assuming ignorance are so very slight that we can not believe the legislature could have intended to attach such a penalty for the simple act of aiding a voter to cast his ballot without requiring him to declare under oath what they already knew beforehand. Suppose an elector with both arms cut off, or afflicted with palsy, or blindness, presents himself, and asks to have his ballot prepared by the judges, are we to say that the judges must go through the empty form of administering the oath as to his physical disability? I think most clearly not. But in any event the mere failure of the officer to perform some prescribed duty, in the absence of any fraud or imposition practiced upon the voters, will not deprive him of his ballot unless the language of the statute allows no other alternative. We think the court correctly held the evidence inadmissible under the allegations of the notice in the

counter contest.

"V. Again it is urged that the court erred in not permitting the contestee to show that in the case of certain electors the Democratic judges went into the booths and assisted certain electors therein named. Section 4784, a part of which has already been copied, contains this proviso:

'Provided, however, that the provisions of this section shall not be construed to allow any judge or judges of any election to enter a booth for the purpose of assisting any elector in preparing his ballot. Such judges, after reading to the elector the contents of the ballot, shall, without leaving their respective positions, prepare such ballot as the elector may dictate.' Acts 1893, p. 164.

"Here again was a positive violation of the law. The judges had no right in the booths and yet there is no allegation that this misconduct was in furtherance of a design to unduly influence these electors, or that they were in fact imposed upon, or any advantage taken of them by the judges. The judges rendered themselves amenable for a violation of the law, but the question here is, shall this unlawful action of the judge disfranchise the illiterate voter for whose protection the statute made provision? Must he suffer because those designated by the law to instruct him violate the law? To so hold would establish a precedent which unscrupulous partisan officials might seize upon to nullify a perfectly fair and honest election. It is a sound distinction of the law which disfranchises a voter for his own failure to obey the plain and positive rules adopted to secure an honest expression of the will of the people, and that which refuses to punish him for the neglect or misconduct of an officer, over whose conduct he has no control, as to some provision which the legislature has not deemed of sufficient importance to declare a noncompliance therewith shall avoid the election or render a ballot illegal and void.

This objection can not, for these reasons, be sustained."

This statement shows that the section in question should be so construed as to preserve the right of a person to vote and not to deny him such right by rigid, arbitrary construction.

In the situation which you have presented, the election judge, by demanding that the prospective voter recite orally the names of the persons for whom he wished to vote, in effect deprived such person of his right to do so. Obviously this section was designed to aid a class of voters whose intelligence or faculties are limited. They are individuals who may easily be frightened by the proceedings at a polling place, particularly by an obviously hostile judge.

The statute does use the word "dictate" in speaking of the voter's indication of his choice, but we feel that to require this word to be given a strictly technical meaning in this section would be wholly contrary to the applicable rules of construction referred to above. In addition, the word "dictate" has been held to be synonymous with "direct". In re Hall's Estate, 51 N.Y.Sup. (2d) 375, 377, 183 Misc. 858. Certainly a request that the judge mark a ballot in accordance with a sample ballot presented by a voter is an adequate direction to the judge.

The courts of this state have not considered the effect of a judge's failure to comply with this section. Courts of other states have held that the duty imposed upon judges of election by a statute similar to this is mandatory. See Shaw v. Burnam, 186 Miss. 647, 191 So. 484. Section 4359, R. S. Mo. 1939, provides:

"If the judges and clerks of any election, or any of them, shall willfully neglect, refuse or omit to perform any duty enjoined or required of them by law with respect to holding and conducting such election, receiving and counting out the ballots and making proper return thereof, or shall inspect or read any ballot voted, or disclose the name or names of any of the candidates or persons voted for by any voters at such election, shall be deemed guilty of a misdemeanor."

We feel that the refusal on the part of an election judge to mark a ballot for an illiterate voter in the circumstances described by you amounts to a failure to perform a duty imposed

Mr. Joe C. Welborn

-6-

upon him by law and is therefore a violation of the section just quoted. Such would seem to be particularly true in the case presented by you in which the judge refused to assist the voter, although he was advised by you as prosecuting attorney that he was required by law to do so.

CONCLUSION

Therefore, we are of the opinion that under Section 11606, R. S. Mo. 1939, upon the presentation by an illiterate voter of a marked sample ballot which the voter states indicates the manner in which he wishes to vote, the election judge is charged with the duty of marking the ballot for such voter according to such sample ballot, and that the failure of the judge to do so is a misdemeanor under Section 4359, R. S. Mo. 1939.

APPROVED:

J. E. TAYLOR
Attorney General

WFB:mw

Respectfully submitted,

WILL F. BERRY, JR.
Assistant Attorney General

MUNICIPAL CORPORATIONS: A municipality and a state agency of the state may contract and cooperate for the purpose of building a sewage disposal plant to be used by the city and the state agency.

March 10, 1948

FILED

96

3/12

Honorable Walter W. Whinrey
Missouri House of Representatives
Jefferson City, Missouri

Dear Mr. Whinrey:

This department is in receipt of your request for an official opinion which reads as follows:

"The citizens of Mt. Vernon in my county have requested me to ask your opinion as to whether the State Sanitarium and their city could cooperate in building a disposal plant. The state institution is located outside the corporate limits of the city and at the present time they are using the same lines and the present system has been out grown. They are either are going to have build separate systems or the state will have to assist in the building of a new sewer. It is proposed to build a disposal plant that can be jointly used."

Section 7403b, Laws of Missouri, 1947, page 401, provides as follows:

"Any municipality or political subdivision of this state, as herein defined, may contract and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof, or with a duly authorized agency of the United States, or of this State, or with other states or their municipalities or political subdivisions for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; provided, that the subject and purposes of any such contract or cooperative action made and entered into by such municipality or political subdivision shall be within the scope of the powers of such municipality or political subdivisions. If such contract

or cooperative action shall be entered into between a municipality or political subdivision and an elective or appointive official of another municipality or political subdivision, said contract or cooperative action must be approved by the governing body of the unit of government in which such elective or appointive official resides." (Underscoring ours)

Under the provisions of the above act the City of Mt. Vernon may contract and cooperate with the Division of Health of the Department of Public Health and Welfare for the purpose of building a disposal plant to be used for the disposal of the sewage of the city and the State Sanitorium at Mt. Vernon.

CONCLUSION

It is, therefore, the opinion of this department that under the provisions of 7403b, Laws of Missouri, page 401, that the City of Mt. Vernon, Missouri may contract and cooperate with the Division of Health of the Department of Public Health and Welfare to build jointly a sewage disposal plant to be used jointly by the City of Mt. Vernon and the State Sanitorium at Mt. Vernon.

Respectfully submitted,

ARTHUR M. O'KEEFE
Assistant Attorney General

AMO'K:mw

APPROVED:

J. E. TAYLOR *JET*
Attorney General

John 8/5
Boys
James 8/9
SCHOOLS
CONSTITUTIONAL LAW:

Section 3 (c), Article IX of the Constitution is self-enforcing; and it is the duty of the State Board of Education to enforce said provision.

July 20, 1948

FILED

96

Honorable Hubert Wheeler
Commissioner of Education
Jefferson City, Missouri

Dear Mr. Wheeler:

We have your letter of recent date which reads as follows:

"Inquiry has come to the State Department of Education about the constitutional provisions of this State relative to differences in wages of teachers because of race or color. These communications indicate that in some cases differences are permitted in wages of teachers having the same training and experience because of race or color.

The new State Constitution of 1945 provides in paragraph 3, Section 3 of Article IX, as follows:

'No school district which permits differences in wages of teachers having the same training and experience because of race or color, shall receive any portion of said revenue or fund.'

As far as this Department can determine, this constitutional provision has not been implemented by legislation.

Section 10390, S.B. 100, Laws of 1947 provides in part that the State Board of Education shall annually, before August 31, apportion the public school fund for the benefit of the schools in the manner provided by law. This law further provides that the County Clerk of each county shall make a summary report of all school applications and forward them to the State Board of Education on or before July 15 each year. These reports contain specific information to be used as the basis for calculating the apportionment, as provided by law.

In the opinion of the Attorney General to this Department August 18, 1941, it was ruled that the State Superintendent of Public Schools cannot question the application and certification, but must make the apportionment according to the figures presented in such application and certification.

I shall appreciate your advice and official opinion in regard to the following questions:

1. Is the constitutional provision, paragraph 3, Section 3, Article IX, self-enforcing without legislative implementation to direct the proper authority for requiring compliance with the act?
2. If the constitutional act is self-enforcing without legislation, who is vested with the power to determine whether or not there is discrimination in any particular case, and who is to take the necessary steps to enforce this constitutional provision?
3. Since the law requires the State Board of Education to apportion school money to districts based on the County Clerk's certified reports, would each particular case of discrimination require court action for a declaratory judgment in order that the State School Money may be denied a district by the State Board of Education?"

The first question to determine is whether or not the constitutional provision referred to in your letter is self-enforcing. In other words, is said constitutional provision so worded and constructed that it must be followed by those charged with enforcing the laws of the state, or does it have to be implemented by legislation by the General Assembly?

The general rule by which it may be determined whether a constitutional provision is self-enforcing was stated by our Supreme Court in the case of State ex inf. v. Ellis 325 Mo. 154, 28 S.W. 2d, 363, 365, as follows:

"The general rule is thus stated in 12 C.J. p. 729:

'It is within the power of those who adopt a constitution to make some of its provisions self-executing, with the object of putting it beyond the power of the legislature to render such provisions nugatory by refusing to pass laws to carry them into effect. * * *

'Constitutional provisions are self-executing when there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed.'

And further, page 730:

'A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficiency and operation on the legislative will.'

The same rule was stated with approval in the later case of State ex Inf. v. Wymore 343 Mo. 98, 119 S.W. 2d 941, 947.

Again in the late case of State ex rel. v. Smith 194 S.W. 2d, 302, 304, our Supreme Court stated the same general principle in a little different language, which is as follows:

"Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the Constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action."

When we apply the foregoing rules of construction to the constitutional provision mentioned in your letter, we think there is no question but what said constitutional provision is self-enforcing. Said constitutional provision leaves nothing to be done by the Legislature to put it into operation. There is nothing in the language of the provision which suggests that something must be done by the Legislature before said provision shall be effective. Said provision squarely lays down the provision that if a school district makes a discrimination in the wages of teachers having the same training and experience because of the race or color of the teachers, it shall receive no state revenue. We do not see what the Legislature could do to add to the protection thus given teachers, and certainly the Legislature could not take anything from the protection thus granted. Furthermore, we think that it would be a matter of common knowledge that questions of racial discrimination were very much before the Constitutional Convention and the public at the time of the adoption of the constitutional provision under consideration, and evidently the Constitutional Convention and the people had in mind remedying a situation which they considered existed at that time. Under the rules of construction above cited, when such a situation exists, the constitutional provision should not be construed as being dependent for its efficiency and operation on the legislative will. If this were not the rule, the will of the people as solemnly declared in their constitution could be easily thwarted by the inaction of the Legislature.

It is, therefore, our opinion that Section 3 (c), Article IX of the Constitution of 1945 is self-enforcing and that no legislation is necessary to implement said provision or to make it effective.

We now turn to the question as to who shall see that said constitutional provision is obeyed and made effective.

Section 10390, P. 500, L. 1947, provides for the apportionment of the public school fund. Said section provides that "The state board of education shall, annually, before August 31, apportion the public school fund applied for the benefit of the public schools in the manner provided by law." It should be observed at this point that the constitutional provision under discussion is part of the law as pointed out above. Said Section 10390 then sets out the basis for calculating the apportionment to the various districts. Said section further provides as follows:

"The clerk of each school district shall make a report and forward to the county superintendent of schools between June 15 and June 30 of each year, showing the number of teachers employed, the total number of days' attendance of all pupils, the length of the school term, the average attendance, the number of days taught by each teacher, the salary of each teacher, and any other information that the state board of education may require. (Emphasis ours.) The aforesaid report shall be sworn to before a notary public or the county clerk. After the reports are properly made the county superintendent of schools shall approve same and turn them over to the county clerk before July 5. The county clerk shall make a summary of all these reports and forward to the state board of education, on or before July 15, a report showing the total number of teachers employed in the county, and the total number of days' attendance of all pupils in the county, the number of teachers employed for the full term and the number for half terms, and the number whose salary is one thousand dollars or more per year, and such other information as the state board of education may require." (Emphasis ours.)

By the foregoing provision the State Board of Education is authorized to require from the district clerks and county clerks any information it may need in order to apportion the funds according to law. In order for the State Board of Education to apportion the school fund according to law, including the constitutional provision under discussion, it would need information regarding the training and experience of teachers and also their racial status. It could easily obtain this information by requiring the district clerks and the county clerks to furnish such information.

The responsibility of the State Board of Education for enforcing the constitutional provision under discussion is further emphasized by Section 8, p. 1641, L. 1945, which prescribes generally the duties of the State Board of Education. Said section reads in part as follows:

* * * Provided further, that the state board of education shall have authority and it shall be the board's duty:

First--to carry out the educational policies of the state relating to public schools as may now or hereafter be provided by law. * * *

Third--to cause to be assembled such information relative to the public schools of the state as will reflect continuously their condition and management.

Fourth--to require of county clerks or treasurers, boards of education or other school officers, recorders and treasurers of cities, towns and villages, copies of all records by them required to be made, and all such other information in relation to the funds and condition of schools and the management thereof as may be deemed necessary. * * *

Sixth--to provide blanks suitable for use by officials in reporting the information required by the board. * * *

It will be seen, therefore, that it is the duty of the State Board of Education to provide blanks suitable for use by officials in reporting the information required by the board. It is made the duty of the State Board of Education to require such information as will reflect the "management" of the various schools. If the management of such schools is making a discrimination between teachers having the same training and experience because of their racial status, such information should be shown on the blanks provided by the State Board of Education. One of the educational policies of the state is that no such discrimination should be made, and the duty to see that such policy is carried out is lodged with the State Board of Education, and said board is given ample authority to see that such policy is carried out.

It is, therefore, our opinion that the State Board of Education is charged with the responsibility of seeing that the constitutional provision under discussion is enforced and that such board has the authority to require of the clerks of school districts and also the county clerks such information as will enable it to determine whether the discrimination prohibited by said constitutional provision exists in any particular case.

What we have said above answers your third question which was "would each particular case of discrimination require court action for a declaratory judgment in order that the State School Money may be denied a district by the State Board of Education?" As pointed out above, the State Board of Education may, by proper efforts, have before it the information from which it can determine whether said constitutional provision is being violated. If the State Board of Education determines that any school district is violating the anti-discrimination provision of the constitution above referred to, it should deny such school district any portion of the public school fund. If the school district thus denied state funds should consider the action of the State Board of Education arbitrary and unwarranted, such district could resort to legal remedies to compel the State Board of Education to apportion it its proper share of said funds. The State Board of Education could justify a refusal of public funds to a district only upon a showing by the reports reaching its office of facts which clearly showed that the district was guilty of violating the constitutional provision under discussion, but if such reports showed such a discrimination, the State Board of Education could not be compelled to apportion funds to the offending district.

Conclusion

It is, therefore, the opinion of this office that (1) Section 3 (c), Article IX, Constitution of 1945, is self-enforcing, (2) it is the duty and responsibility of the State Board of Education to determine whether said constitutional provision is being violated by any school district and (3) it would not be necessary that a court action be had before the State Board of Education could determine whether or not there had been a discrimination by any particular district.

Yours very truly,

APPROVED:

HARRY H. KAY,
Assistant Attorney General

J. E. TAYLOR, Attorney General

SCHOOLS: Senate Bill No. 4 of the 64th General Assembly
JUNIOR COLLEGES: applies to junior colleges.

FILED
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August 5, 1948

8-6-48

Honorable Hubert Wheeler
Commissioner, Dept. of Education
Jefferson City, Missouri

Dear Mr. Wheeler:

This is in reply to your letter of recent date presenting the following question for the consideration and opinion of this department:

"Since junior colleges are organized in public school districts in this State, as provided in Section 10565, instead of specific laws creating state colleges and universities, would the requirement in Section 10374 for giving instruction in the Constitution of the United States and of the State of Missouri, and in American History, including the study of American institutions apply to junior colleges the same as for state colleges and universities?"

The provisions of Senate Committee Substitute for Senate Bill No. 4 of the 64th General Assembly, pertaining to this question, are found in the Laws of Missouri, 1947, Volume I, page 492, as follows:

Sec. 10373. "In all public and private schools located within the State of Missouri, except privately operated trade schools, commencing with the school year next ensuing after the passage of this Act, there shall be given regular courses of instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions."

Sec. 10374. "Such instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions, shall begin not later than the opening of the Seventh Grade, and shall continue in the high school courses and in the courses in state colleges and universities and, to an extent to be determined by the State Commissioner of Education."

This department ruled in an opinion to Mr. C. A. Phillips, Chairman of the Committee on Accredited Schools and Colleges, University of Missouri, Columbia, Missouri, dated August 7, 1947, that the courses in the Constitution of the United States and of Missouri, and in American history, including the study of American institutions, in accordance with Senate Committee Substitute for Senate Bill No. 4 of the 64th General Assembly, must be included in all grade schools, commencing with the seventh grade and continuing through high school, and in courses in state endowed colleges and universities, to an extent to be determined by the State Commissioner of Education.

Under the provisions of Section 10565, Laws of Missouri, 1945, page 1667, any public school district in this state which now has or hereafter may have a fully accredited high school may provide for two-year college courses in such schools, on the approval of and subject to the supervision of the State Board of Education. And according to Section 10567, R. S. Mo. 1939, any school districts making provision for the teaching of such college courses are entitled to participate in the regular apportionment of the public funds in accordance with the provisions of Section 10390, R. S. 1939 (as reenacted, Laws of 1947, page 497), as far as the same is applicable.

The question now arises as to whether such colleges commonly known and referred to as junior colleges are state colleges within the meaning of Senate Committee Substitute for Senate Bill No. 4, supra. Public schools are schools established under the laws of the state and maintained at the public expense by taxation. *Newman v. Schlarb*, 50 Pac. (2d) 36, 1.c. 39 (Supreme Court of Washington). A public school is one that derives its support in whole or in part from moneys raised by taxation. *Cooke, County Superintendent of Schools, v. School Dist. No. 12*, 21 Pac. 496, 1.c. 497 (Supreme Court of Colorado).

There is no question but that the junior colleges under consideration were established under the laws of this state and are maintained at least in part at public expense. Section 10373, supra, a general section, provides that said courses shall be given in all public and private schools. Section 10374, supra, is more specific in providing that such instruction shall begin not later than the opening of the seventh grade and shall continue in the high school courses and in the courses in the state colleges and universities. The terms "school" and "college" convey the same idea, differing only in grade. State v. Erickson, 75 Mont. 429, 1.c. 441 (Supreme Court of Montana).

The fact that said junior colleges do not receive specific annual or biennial appropriations as such for their support, as do the University of Missouri, Lincoln University and the various state colleges, is of no significance since said junior colleges were established under the laws of this state, are subject to the supervision of the State Board of Education and receive the regular apportionment of public funds. It cannot be seriously contended that said junior colleges are private colleges in any sense of the word or fall in any other such classification. On the other hand, it is manifestly clear that they are state colleges within the legal contemplation of said Senate Committee Substitute for Senate Bill No. 4, supra.

Conclusion.

Therefore, it is the opinion of this department that Senate Committee Substitute for Senate Bill No. 4 of the 64th General Assembly, requiring instruction in the Constitution of the United States and of the State of Missouri, and in American history, including the study of American institutions, to be given in the state colleges and universities, applies to junior colleges established under the provisions of Section 10565, Laws of Missouri, 1945, page 1667.

Respectfully submitted,

APPROVED:

DAVID DONNELLY
Assistant Attorney General

J. E. TAYLOR *JEB*
Attorney General

DD:ml

ELECTIONS: Townships only entitled to representation
COMMITTEEMAN: when county court has not recognized city
wards as election districts.

May 20, 1948



Honorable Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri

Dear Mr. Williamson:

This is in reply to your request of recent date for an opinion, which reads as follows:

"I would like to have an opinion as to the proper manner in which the positions of committeeman and committeewoman, respectively, should be filled in Fulton Township in the August primary.

"Fulton Township is composed of the city of Fulton and some outlying territory. The city is divided into four wards for the purposes of city elections only. The township is divided into six election precincts for the purpose of voting for county offices. These election precincts cross ward lines and may consist of districts both within and without the city limits.

"Should there be printed on the ballot names for committeemen and committee-women for the wards and also for the township, or should there only be printed on the ballot the names of those who have filed for Fulton Township as a whole?"

Section 11482, R. S. Mo. 1939, provides as follows:

"The county courts of the several counties in this state shall have power to divide any township in their respective counties

into two or more election districts, or to establish two or more election precincts in any township, and to alter such election districts and precincts, from time to time, as the convenience of the inhabitants may require."

As we understand the facts, as embodied in your opinion, the county court has divided the township of Fulton into six election precincts but has not seen fit to make coincident the boundaries of these precincts with the boundaries of the wards in the city of Fulton. Therefore, it would seem that the county court has not declared the wards of the city of Fulton as election districts.

The statute providing for the election of committeemen and committeewomen is Section 11572, R. S. Mo. 1939, which reads, in part, as follows:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committee men for such township, or voting district, and the man and the woman receiving the highest number of votes in such township, or election district, shall be the members of the party committee of the county, or in the case of a city not within the county, of the city of which such voting precinct, or district is a part: * * *."
(Underscoring ours.)

We have seen above that the county court has not provided for the wards of the city of Fulton to be voting districts. We are of the opinion that because of the language used in Section 11572, supra, "as the case may be," that without this designation the wards are not entitled to representation on the party committees of the county. This particular section of the statutes has not been passed upon by the courts of this state with this factual situation in view, but the Supreme Court of the State of Minnesota, in passing upon an analogous situation in an early case, said in the course of their opinion:

"* * * The mere creation of village organizations within townships, for the purposes of local government, could not be deemed to have abrogated, as to such municipalities, the statute regulating elections for other than local purposes. Nor would the fact that very extensive and complete powers as to local affairs had been conferred, justify the conclusion that it was intended that such villages should constitute separate election districts for the purpose of elections pertaining only to the affairs of the county and of the state. * * *"
(Stemper v. Higgins, 37 N. W. 95, l. c. 96).

Thus, the fact that the city of Fulton has been divided into wards for municipal purposes is not binding upon the county court when dividing the township of Fulton into election districts. Nor are the six election districts as established by the county court in Fulton Township entitled to representation on the party committees, due to the provisions of Section 11579, R. S. Mo. 1939, which reads as follows:

"The word 'county' as used in this article shall include the several counties of this state and the city of St. Louis, and the word 'precinct' and the words 'election districts' shall include and refer to wards or townships as the case may require, but shall not apply to any subdivision less than a ward within any city subdivided into wards, or to any subdivision less than a township in any county."

By the provisions of Section 11579, supra, it is clear that no less a subdivision than a township in a county is entitled to committee representation unless, as indicated above, the county court has recognized city wards as election districts by establishing coincident boundary lines.

It is our view of the law that the offices to be filled at the August primary are committeeman and committeewoman from Fulton Township.

Honorable Hugh P. Williamson

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Conclusion

It is the opinion of this department that unless the county court has recognized city wards as election districts within the township the wards are not entitled to representation on the party committees of the county, but representation should be limited to one committeeman and one committeewoman for the whole township. This opinion is not applicable to counties of the first class and the City of St. Louis.

Respectfully submitted,

JOHN R. BATY
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

JRB:ml

Shelley
Double Jeopardy: Failure to support children is a continuing offense and one conviction therefor will not prevent subsequent conviction for some offense on another day, and will not subject person charged to double jeopardy.

FILED

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June 17th, 1948.

6-26

Hon. Robert P.C. Wilson, III,
Prosecuting Attorney,
Platte County,
Platte City, Missouri.

Dear Mr. Wilson:

This will acknowledge receipt of your letter of May 25th, 1948, in which you request an opinion of this department. Your letter, omitting caption and signature, is as follows;

" I respectfully request the opinion of your office on the following:

A, the husband of B, is arrested and convicted under the provisions of Section 4420, Laws Missouri, 1947. He receives a jail sentence, is released, and thereafter, without good cause fails and refuses to provide adequate food and clothing for his small children. May another prosecution be carried to a conviction, or double jeopardy?"

For a solution to this problem, the provisions of Section 4420, Laws of Missouri, 1947, must be examined. This statute prescribes the following;

" If any man shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for such wife; or if any man or woman shall, without good cause, fail, neglect or refuse to provide adequate food, clothing, lodging, medical or surgical attention for his or her child or children, born in or out of wedlock, under the age of sixteen years, or if any other person having the legal care or custody of such minor child, shall without good cause, fail, refuse or neglect to provide adequate food, clothing, lodging, medical or surgical attention for such child, whether or

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not, in either such case such child or children by reason of such failure, neglect or refusal shall actually suffer physical or material want or destitution; or if any man shall leave the State of Missouri and shall take up his abode in some other state, and shall leave his wife, child or children, in the State of Missouri, and shall, without just cause or excuse, fail neglect or refuse to provide said wife, child or children, with adequate food, clothing, lodging, medical or surgical attention, then such person shall be deemed guilty of a misdemeanor; and it shall be no defense to such charge that some person or organization other than the defendant has furnished food, clothing, lodging, medical or surgical attention for said wife, child or children and he or she shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine not exceeding one thousand dollars (\$1,000) or by both such fine and imprisonment. No other evidence shall be required to prove that such man was married to such wife than would be necessary to prove such fact in a civil action."

In your request for an opinion you state that the husband was arrested and convicted under the provisions of the above statute. You did not state whether he was convicted of the crime of abandonment or of failure to support his wife and children. This section of the statutes regulates two separate and distinct crimes, that of abandonment of wife or children and that of failing to provide the necessary food, clothing, lodging and medical and surgical attention for his wife or children. In the case of *Miller vs Gerk*, 27 SW (2) 444, 1 c 445, the Court stated as follows;

"As re-enacted by the Legislature in 1921 when the disjunctive was substituted for the conjunctive, the statute now in effect denounces two offenses, though they are not usually regarded as being wholly separate, distinct and disassociated: the first being the crime of abandonment and the second of failure to support."

However, in your present state of facts, the subsequent violation is that of failing to provide adequate food and clothing for his small children. If the offense for which he had been convicted was that of abandonment, then a prosecution in which he was charged with failing to provide food and clothing could not subject him to double jeopardy since the offenses are separate. The only question then remaining is, if the conviction was based on a charge of failure to provide

Hon. Robert P.C. Wilson, III.

support, food or clothing for his children, then will a subsequent charge for the same offense subject him to double jeopardy.

We will assume for the purposes of this opinion that he is charged on each occasion with the same crime, of failing to provide food and clothing for his children. Such a state of facts was discussed in the case of Miller vs Gerk, supra. The Court in discussing that case made the following statement:

" Abandonment in its strict sense occurs whenever the parent separates from or deserts the child; and once the offense has been committed, it would seem that there could be no second offense, unless the parent returns to the discharge of his parental duty and again deserts his child. (Citing cases) Not so, however, with the offense of failure to support, for inasmuch as the parent's obligation to support his child is a continuing one so also is his offense for failure to meet his obligation, within the age limits fixed by the statute which defines the offense."

Under the above decision this department must find that the offense of failure to support children is a continuing one and the fact that a person has been convicted once for that offense will not act as a bar to another prosecution and conviction.

But the question arises as to how often the offense can occur. In 16 Corpus Juris 268 we find the following statement with reference to continuing offenses;

"*** But it is not a bar to a subsequent prosecution for continuing the offense thereafter. Each day during which it continued, constitutes a separate offense and will support a separate prosecution, provided the information or indictment alleges such specific day, and the state confines its proof to the date alleged."

There seems to be no authority in this state which passes on this particular point but under the above statement, it is the opinion of this department that each day that a parent fails to provide clothing, lodging, food and medical and surgical attention to his children constitutes a separate and distinct offense.

Hon. Robert P.C. Wilson, III.

CONCLUSION.

It is therefore the opinion of this department, that the failure of a parent to provide food, clothing, lodging or medical and surgical attention to his children is a continuing offense and the fact that one conviction has been had against an individual on such a charge will not prevent a subsequent prosecution and conviction on the same charge on another subsequent date, each day the offense continues constituting a separate and distinct offense.

Respectfully submitted,

JOHN S. PHILLIPS,
Assistant Attorney General.

APPROVED:

J.E. TAYLOR. *JB*
Attorney General.

CITIES: Cities of third-class may acquire land for airport without boundaries of said city and in another
AIRPORTS: county. However, in the absence of specific legislation, said city cannot exercise police power for violations of regulations and laws on said airport.

July 10, 1948

Honorable Hugh P. Williamson
Prosecuting Attorney
Callaway County
Fulton, Missouri



Dear Sir:

This will acknowledge receipt of your request for an opinion, which reads:

"I would like to have an opinion upon the following set of facts:

"Jefferson City, located in Cole County, has purchased land in Callaway County to be used as a Municipal Airport. Can Jefferson City policemen police this Jefferson City Airport located in Callaway County; can they make arrests on that airport property on violations of the law which occur there, and can they then take the person arrested into Cole County for trial."

It is well established that the General Assembly of this State has the power to pass legislation specifically authorizing cities to exercise police powers and regulations over land they acquire for airport or airport landing fields that lie outside the boundaries of said cities. However, a careful search fails to disclose wherein any general assembly of this State has specifically enacted such legislation, unless such authority can be found in the use of such words as "maintain, operate and regulate," as used in the statutes authorizing cities to construct and operate airports or landing fields outside the boundaries of said city, which we shall deal with later on in this opinion.

In Pearson v. Kansas City, 55 S.W. (2d) 485, 1. c. 491, the court said:

"There is also another feature of this case which distinguishes it from any of the other cases referred to herein.

That is: The police station and the elevator therein was entirely under the control of the police board, which was a state agency. State ex rel. Field v. Smith (Mo. Sup.) 49 S. W. (2d) 74; American Fire Alarm Co. v. Board of Police Commissioners, 285 Mo. 581, 227 S. W. 114. A municipal corporation has no inherent police power, but derives it solely from delegation by the state. 19 R.C.L. 800, Sec. 108; 43 C. J. 205, Sec. 204. 'The protection of life, liberty, and property, and the preservation of the public peace and order, in every part, division, and subdivision of the state, is a governmental duty, which devolves upon the state, and not upon its municipalities, any further than the state, in its sovereignty, may see fit to impose upon or delegate it to the municipalities.' State ex rel. Hawes v. Mason, 153 Mo. 23, loc. cit. 43, 54 S. W. 524, 529; see, also, State ex rel. Reynolds v. Jost, 265 Mo. 51, 175 S. W. 591, Ann. Cas. 1917D, 1102; Strother v. Kansas City, 283 Mo. 283, 223 S. W. 419; State ex rel. Board of Police Commissioners v. Beach, 325 Mo. 175, 28 S. W. (2d) 105. In this state, the Legislature had not seen fit to delegate completely to Kansas City the function of maintaining a police department, but had retained control thereof in the state by placing upon the Governor of the State the duty of appointing the police board which would have charge of such functions there. While the police board was in charge of the station, there was nothing the city could do about it. As said in 19 R. C. L. 1114, Sec. 394: 'The rights and powers of a municipality are subject to the will and control of the legislature, and it lies within the power of the legislature to take the control of some municipal department out of the hands of the municipality and turn it over to some board of state officers. When this has been done, upon rudimental principles of justice the municipality cannot be held

liable for the negligence of such officers, regardless of the nature of the function which they are administering.'"

Under Section 277, page 902-903, Volume 37, Am. Jur., the rule is laid down that police power of municipalities exists solely by virtue of legislation or constitutional grant, and reads:

"The prevailing view in this country is that the police power of municipalities exists solely by virtue of legislative or constitutional grant.

"In some American cases, particularly those dealing with such important police functions as protecting the public health or guarding the public safety from such dangers as fire hazards, there have from time to time appeared statements, intimations, and dicta that certain police powers are inherent in municipalities from the very fact of their organization. Many of these broad statements can be explained on the basis that the courts really had in mind implied powers, as the entire context of the opinions shows, and in the various jurisdictions where such broad statements concerning inherent municipal police powers have been made in certain opinions, the courts on numerous other occasions and in later opinions have reiterated the well-established American doctrine that municipal corporations have such police powers only as are expressly given or necessarily implied."

Cities derive their authority to construct and operate airports and landing fields under and by virtue of the following provisions: Section 15122, R.S. Mo. 1939, authorizes cities to acquire, maintain, operate and regulate, in whole or in part, alone or jointly, or concurrently with others, airports or landing fields within or without the limits of such cities, and reads:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, alone or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

Furthermore, Section 15124, R.S. Mo. 1939, declares such land acquired for airports or landing fields to be for a public purpose and as a matter of public necessity.

Section 15126, R.S. Mo. 1939, which is a part of the same article as are the foregoing provisions; namely, Article 3, Chapter 123, R.S. Mo. 1939, authorizes the legislative body of a city to construct and operate an airport or landing field, or said city may vest jurisdiction for the construction, improvement, equipment, maintenance and operation of such airport or landing field in some officer or board of the city, or may by franchise or contract authorize others to do same. It further authorizes the legislative body of the city to adopt regulations and establish fees or charges for the use of said airport or landing field, and reads:

"The local legislative body of a city, including cities under special charter, village, town or county which has established an airport or landing field and acquired, leased, or set apart real property for such purpose may construct, improve, equip, maintain, and operate the same, or may vest jurisdiction for the construction, improvement, equipment, maintenance, and operation thereof, in any suitable officer, board or body of such city, village, town or county, or may by franchise or contract authorize others, in whole or in part, to construct,

equip, maintain, and operate the same. The expense of such construction, improvement, equipment, maintenance and operation shall be a city, village, town or county charge, in whole or in part, as the case may be. The local legislative body of a city, village, town, or county may adopt regulations and establish fees or charges for the use of such airport or landing field."

The 62nd General Assembly repealed Section 15125, R.S. Mo. 1939, and enacted in lieu thereof a section known as Section 15125, which merely authorizes cities to acquire by purchase property for an airport or landing field. Subsequent thereto, the 63rd General Assembly passed a law, page 1315, Laws of Missouri 1945, authorizing cities, towns and counties to purchase sites and construct and operate airfields in such counties or near such cities and towns, and reads:

"In appreciation of the services of our gallant Armed Forces and to perpetuate the memory of their heroic achievements in the war against Germany, Japan and their Allies and to promote the advancement of aviation in the name of those who gave their lives as members of our gallant Armed Forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate air fields in such counties or near such cities and towns and to receive free technical advice from the Department of Resources and Development. Provided further that when any city, town or county in Missouri shall certify to the Governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such air fields a like sum not

exceeding ten thousand dollars (\$10,000.00) shall be allotted to said city, town or county from the appropriation hereinafter made for such purpose but said sum shall be released to such city, town or county only after the Department of Resources and Development has certified to the Governor that in their judgment the air field in question is desirable and in the interest of the development of aviation and that the funds proposed are adequate to complete the project; and provided further that cities, towns or counties are hereby authorized to receive Federal grants in addition to all other grants or funds made available for such purpose under this act."

While there are some decisions in other states holding that police power in such cases may be implied, we believe Missouri does not follow such decisions. We find only one decision in this state wherein this question is discussed at any length, that is as to the municipality's exercising police powers over a municipal airport outside the boundaries of said municipality, and that is in *Chambers.v. City of St. Louis*, 29 Mo. 543, l.c. 575, wherein the court held that, by the act authorizing a city to hold land beyond her limits for objects connected with the purposes of said corporation and necessary for her prosperity and welfare, it was intended that over such places she could exercise such police powers as would be required to make them answer the purposes for which they were designed. In so holding, the court said, l. c. 574:

"It is not denied but that the city, under her charter, could take all the lands devised to her within her limits, if the devise had been to her own use, uncoupled with the trust to which, by the terms of the devise, it was subjected. But it is maintained that, as to the lands outside of her limits, she could only take them for the specific purposes enumerated in the section to which reference has been made; and it is insisted that the enumeration of the particular purposes for which

lands may be held beyond the limits of the city is an exclusion of all other purposes for which lands thus situated may be held. But the force of this argument is broken, when we consider that, independently of the powers conferred by the charter, the city had, under the section of the act concerning corporations above cited, a power to hold such lands, without regard to their locality, as may be necessary for the purposes of the corporation; and the third section of the same act declares that such power shall be in addition to any power that may be conferred by the charter. Statutes in pari materia are to be construed so that they may all stand. A repeal of the statute by implication is not favored in law. Lands held by the city beyond her limits would be held by her as by any individual proprietor, and her powers over them would only be commensurate with those enjoyed by private owners. But, by authorizing her to hold lands beyond her limits for objects intimately connected with the purposes of the corporation and highly necessary for her prosperity and welfare, it was intended that, over such places, she should exercise such police powers as would be required in order to make them answer the purposes for which they were designed."

In Volume 61, Am. Law Review, we find wherein a very exhaustive study has been made relative to this question, and reads in part:

"Where a city has legally acquired an outside source, it is, of course, subject to liability for negligence just as fully as if the whole water system were within the city's limits. In the nature of the case it must, also, compensate riparian

owners. But suppose a city has acquired water rights in some river, lake, or watershed, may it also exercise police jurisdiction therein to prevent pollution or the destruction of dams, mains, and other works? The statutes and charters in a number of cases seem to confer this power of police, but the decisions of the high state courts have little to say upon the subject.* * *

In the same Volume 61 of the Am. Law Review, pages 689-690, more is said of how far a municipality may exercise police power outside of said municipality, and reads:

"The boundaries of the city set down in its charter may then be said to define the territorial limits of its agency as a governmental agent of the state. It is perhaps for this reason that the courts are united in refusing to imply any power on the part of cities to exercise police powers beyond their limits. It is obvious that such power could not be implied without getting the courts into serious difficulties in trying to define the extent of the powers inferred. Should they extend for one mile, or two miles, or over the entire county or even farther? The safest course and the only proper one for the courts is to construe a city's police powers to be limited to its ordinary area unless the charter or laws clearly provide otherwise. Even the powers expressly granted to a city over adjacent areas are to be construed strictly so as to prevent cities from doing what the legislature has not authorized. Thus a power 'to direct the location of markets or slaughter-houses' for two miles beyond the city is not a power to prohibit such establishments in this entire zone."

Section 122, page 736-737, Vol. 37, Am. Jur., we find the general rule that municipalities have no extraterritorial police powers in the absence of some constitutional provision or statute granting that authority, and reads:

"The primary purpose of a municipal corporation is to contribute toward the welfare, health, happiness, and public interest of the inhabitants of such corporation, and not to further the interests of those residing outside its limits; therefore, the general rule is that municipal corporations have no extraterritorial powers, but their jurisdiction ends at the municipal boundaries and cannot, without specific legislative authority, extend beyond their geographical limits. The legislature may, however, confer jurisdiction upon municipal corporations for sanitary and police purposes, and for license regulation under the police power, over territory contiguous to the corporation. * * *"

Section 116, Volume 37, Am. Jur., in part, reads:

"As has been noted, municipal corporations possess and can exercise only such powers as are expressly conferred, or those necessarily or fairly implied from or incident to those expressly conferred, or those essential to the accomplishment of the declared objects and purposes of the corporation. * * * Power conferred upon a municipality to do all things that in the discretion of the governmental authority may seem necessary for the good order and welfare of the municipality grants only the right to exercise a discretion within the scope of the power conferred. The charter or statute by which the municipality is created is its organic act. Neither the corporation nor its officers can do any act, make any

contract, or incur any liability, not authorized thereby, or by the legislative act applicable thereto. All acts beyond the scope of the powers granted are void."

In view of the foregoing authorities and decisions, we are of the opinion that *Chambers v. City of St. Louis*, supra, wherein it was held that it was intended the city should exercise such police powers as would be necessary to carry out the purpose for which designed is more or less dictum and not sufficient authority for vesting in the authorities of Jefferson City, Missouri, police power over the airport or landing field located in Callaway County, Missouri. This was indicated in the note at the bottom of page 651, Vol. 61, Am. Law Review, hereinabove referred to. Said note stated that part of the foregoing decision referred to relative to the municipality's having implied police power is merely dictum.

Therefore, we shall examine the statutes which permit said municipality to acquire land outside the boundaries of said municipality for an airport or landing field to determine if there is any specific police power vested in said municipality under such act.

Section 15122, R.S. Mo. 1939, authorizes cities to operate and regulate airports and landing fields within or without the limits of said cities. Can we say that the Legislature, by using such words, intended the city should exercise police power over said airports or landing fields located outside of said city to the extent of making arrests for violating the laws of this state thereon and bring the offender back to the City of Jefferson to be charged and stand trial? While such words are sometimes broadly construed, we are inclined to answer the question in the negative in the absence of more specific legislation granting to said city specific police powers over said area.

"Regulate" has been defined in many ways, depending upon how it is used. In *Wilhoit v. City of Springfield*, 171 S.W. (2d) 95, 1.c. 100, the court in defining the word "regulate," as used in the motor vehicle act, subsection (b), Section 8395, said:

"Subsection 'b' of Section 8395, supra, provides: 'Municipalities may, by ordinance, make additional rules of the road or traffic regulations to meet their needs and traffic conditions; * * * regulate the parking of vehicles on the streets and prohibit or control left-hand turns of vehicles * * *. No ordinance shall be valid which contains provisions contrary to or in conflict with this article, except as herein provided.'

"Subsection 'b' delegates to the city the power to regulate the parking of vehicles on the streets. This grant of authority carries with it broad discretionary power and under the word 'regulate' the city may invoke all the reasonable and necessary police powers it may have in enforcing its control over the streets, and particularly with respect to the parking of vehicles. Roper v. Greenspon, supra; McGill v. City of St. Joseph, supra."

Also, in Marsh v. Bartlett, 121 S.W. (2d) 737, the court construed the constitutional amendment creating the Conservation Commission of this state and prescribing its duties (Section 16, Article XIV, Constitution of Missouri 1875), which amendment provided in part that the control, management, restoration, conservation and regulation of bird, fish, game, forestry and all wildlife resources of this state, including sanctuaries, refuges, reservations and all other property now owned or used for said purposes or hereafter acquired for said purposes and the acquisition and establishment of same and the administration of laws now or hereafter pertaining thereto shall be vested in a commission to be known as the Conservation Commission. The court, in construing the word "regulate," as used in said amendment, said, 1. c. 744:

"It has been indicated above that the Conservation Commission has been granted the authority to control, regulate, etc., the matters committed to it. There was much discussion by counsel in their oral

arguments, and much appears in their brief, with reference to the meaning of the words definitive of that authority. In the aspect of the Amendment now under consideration there is no need to go into definition of the various terms. They take color and significance from the context.

"The term 'regulate' will be sufficient for the moment. It includes ordinarily the means to adjust, order, or govern by rule or established mode; direct or manage according to certain standards or rules. *Sluder v. St. Louis Transit Co.*, 189 Mo. 107, 88 S.W. 648, 5 L.R.A., N.S., 186. Regulation and legislation are not synonymous terms. In re *Northwestern Indiana Tel. Co.*, 201 Ind. 667, 171 N.E. 65, 70. Regulation is comprehensive enough to cover the exercise of authority over the whole subject to be regulated. *Southern R. Co. v. Russell*, 133 Va. 292, 112 S.E. 700, 703."

Likewise, the courts have construed the word "operate." However, under such construction, it does not appear to have as broad a meaning as the word "regulate." In *State ex rel. City of Chillicothe v. Wilder*, 98 S.W. 465, 200 Mo. 97, the court said, l.c. 106:

"* * * The word 'maintain' does not mean 'to provide or construct,' but to keep up and preserve, and the word 'operate' means to put into or continue in operation or activity. * * *"

In *State v. Erle*, 232 N.W. 279, 281, 210 Iowa 974, the court held the word "operate" means to act or control or to manage authoritatively, to conduct or manage the affairs of, to direct or to put into action, activity or operation, to supervise the work of, to work.

A review of the statutes will show that when the Legislature of this state intended for a city of third class to exercise police power over territory such municipality was authorized to acquire for specified purposes outside the geographical boundaries of said municipality, the Legislature did not merely leave the matter to be determined by implication or construction of such words as "operate" and "regulate," but specifically authorized said municipality to exercise police power over such acquired area.

We refer you to the following instances: Section 6953, Article 5, Chapter 38, R.S. Mo. 1939, provides that the council may make regulations and pass ordinances for prevention of the introduction of contagious diseases into the city and may make quarantine laws and enforce the same within five miles of said city; also, that the council may purchase or condemn and hold for the city, within or without the city limits, within ten miles therefrom, all the necessary land for hospital purposes, waterworks, sewer carriage and outfall, and erect, establish and regulate hospitals, workhouses, poor-houses, and provide for the government and support of same; and concludes that the police jurisdiction of the city shall extend over such lands and property to the same extent as over public cemeteries, as provided in this article. Section 6972 under Article 5, Chapter 38, R.S. Mo. 1939, provides that the council in third-class cities (such as Jefferson City, Missouri) may purchase within the city, or within three miles thereof, real estate for public cemetery purposes, and that the council may make rules and pass ordinances imposing penalties and fines, not exceeding \$100.00, regulating, protecting and governing city cemeteries, the owners of lots therein, visitors thereto, and punishing trespassers therein; and officers of said city shall have full jurisdiction and power in the enforcement of such rules and ordinances as though they related to the city itself. Section 7014, Article 5, Chapter 38, R.S. Mo. 1939, provides that for any purpose or purposes mentioned in preceding sections, the council shall have power to enact and make all necessary ordinances, rules and regulations, and they shall have power to enact and make all such ordinances and rules, not inconsistent with the laws of this state, as may be expedient for maintaining the peace and good government and welfare of the city, and all ordinances may be enforced by prescribing and inflicting upon its inhabitants, or other persons violating same, such fine not exceeding \$100.00 and such imprisonment, not exceeding three months, or by fine and imprisonment, as may be just for any offense,

recoverable with cost of suit, together with judgment of imprisonment, until fine or cost are paid or satisfied. Furthermore, Section 7015, R.S. Mo. 1939, a part of the same article, provides that any person who shall violate any of the provisions of this article, for the violation of which no punishment has been provided, shall be deemed guilty of a misdemeanor, and upon conviction shall be punished according to law.

In view of such provisions, specifically vesting in such municipalities police power over such areas acquired by the municipalities, no one can question their authority in such cases as to having the right to pass ordinances and enforce such ordinances and regulations in the same manner as if such violations had been committed within the cities and not miles outside of said municipalities. It is not necessary to give any words used a strained construction to grant such municipalities police power over such areas outside the boundaries of said municipalities. However, that is not true in the instant case, where no such specific police powers are granted over said area outside the boundaries of said municipality. We are inclined to believe that the well established rule of statutory construction that the expression of one thing is exclusion of another is applicable in the instant case. (See State ex rel. Kansas City Power & Light Company v. Smith, 111 S.W. (2d) 513, 342 Mo. 75; Kroger Grocery & Baking Company v. City of St. Louis, 106 S.W. (2d) 435, 341 Mo. 62, 111 A.L.R. 589.) As we have shown, the Legislature has heretofore authorized such third-class cities to acquire land outside the cities for certain purposes, not airports or landing fields, and has vested in such cities police power over such areas, therefore by reason of the fact the Legislature has failed to specifically vest police power over airports and landing fields, we must conclude, under the foregoing rule, it did not intend to give such authority.

CONCLUSION

Therefore, it is the opinion of this department that, while the City of Jefferson City, a third-class city, is authorized to acquire land for airport or landing field outside of Jefferson City and located in Callaway County, so far

Hon. Hugh P. Williamson

-15-

the Legislature has not delegated to said city power to pass ordinances for violations of regulations and laws committed on such airport or landing field, and until the Legislature does specifically delegate such authority to said city, it cannot exercise police power, make arrests in Callaway County, and bring the offenders to Jefferson City and charge them and require them to stand trial in said city.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

ARH:LR

*Copy to
Z. Smith*

COUNTY COURTS: County courts in counties of the third class may charge mileage for each trip in going to and from court.

22nd

July 21, 1948

FILED

97

Honorable John F. Wilson
Presiding Judge
Jasper County Court
Joplin, Missouri

7-22

Dear Sir:

This is in reply to your letter of recent date wherein you request an official opinion from this department in the following language:

"Will you please furnish the undersigned with an official opinion on the question of the authority of the members of the county court in a county of the second class to charge and collect mileage for each trip they make in holding court in such counties?"

In order for officers to be entitled to compensation for duties performed in connection with their office, they must be able to point to the statute authorizing such charges. Cite Nodaway County vs. Kidder, 129 S.W. (2d) 857. With that principle in mind, we look to the statutes to determine whether or not members of the court may charge mileage for each trip they make in holding court. Jasper County being a county of the second class, we find that in Laws of Missouri, 1945, page 838, the law which relates to the compensation and mileage of judges in such counties, Section 2 of the act fixes the salaries of the judges. Section 3 of the act provides as follows:

"The judges of the county court in counties of the second class shall receive the sum of five cents per mile for each mile actually and necessarily traveled in the performance of their official duties. All claims for reimbursement for mileage shall be in writing, and signed by the judge making claim therefor, and filed with the clerk of the county court. Every such claim shall show the miles traveled, the date of each trip, the nature of the business, and the places to and from which such judge has traveled during the period covered."

It will be noted from this section that there are no limitations on the number of trips judges may charge for attending courts in their counties. The only provisions are that the miles traveled must be necessarily traveled in the performance of their official duties. Prior to the enactment of the 1945 act, Section 2494, R. S. Mo. 1939, provided for the compensation and mileage of judges in counties of the same class as Jasper County. This section limited the number of times that judges of county courts in counties of less than 20,000 inhabitants could make this mileage charge, but it did not limit the number of times that judges of county courts in counties such as Jasper County could make this charge in any one year. Apparently the lawmakers, by the enactment of the 1945 act, supra, have intended not to change the law in respect to the number of times county judges in counties such as Jasper County may charge mileage for attending court.

CONCLUSION

From the foregoing, it is the opinion of this department that judges of county courts in counties of the second class are not restricted in the number of times they may charge mileage which they actually and necessarily travel in the performance of their official duties.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:VLM

September 23, 1948

FILED

97

9-23

Honorable Robert P. C. Wilson III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

We have yours of recent date in which you request an opinion of this department on the question of whether or not real estate owned in Platte county by the City of Kansas City, Missouri is subject to taxation.

In your letter you state that this real estate is not used for city purposes, that it adjoins real estate on which the city waterworks are located and is rented and used solely as a farm.

Section 6, of Article 10 of the Constitution of Missouri, 1945, which relates to the subject of exemption from taxation property reads, in part, as follows:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; * * *"

The 63rd General Assembly passed an enabling act to this section which will be found in Laws Missouri, 1945, at page 1800. The Act insofar as it applies to your question, reads, in part, as follows:

"The following subjects shall be exempt from taxation for state, county or local purposes: First, lands and other property belonging to this state; Second, lands and other property belonging to any city, county or other political subdivision in this state, including market houses, town halls and other public structures, with their furniture and equipments and on public squares and lots kept open for health, use or ornament; Third, lands or lots of ground granted by the United States or this state to any county, city or town, village or township, for the purpose of

education, until disposed of to individuals by sale or lease; Fourth, non-profit cemeteries; * * *".

From the way you have stated your question, you seem to take the position that even though the land is owned by the city, yet, since it is not used for city purposes it should not receive the benefits of the exemption sections. We do not think that the Missouri courts have given these exemption sections of the Constitution and statutes that construction. In other words, we think that "ownership" determines whether or not property owned by municipalities is exempt from taxation.

In 129 A.L.R. at page 481, Subhead II, cases are annotated under the heading of unqualified exemption of publicly owned property, and the following principle is stated over which those cases are cited,

"The rule stated in the earlier annotations, that where the exemption of property owned by the state or subordinate municipal bodies is express and unqualified, such property cannot be taxed, irrespective of the use to which it is put, was applied in Anderson-Cottonwood Irrig Dist. V. Klukert(1939) 13 Cal(2d) 191, * * * *"

The case of Grand River Drainage District vs. Reid, 341 Mo. 1246, 111 S.W. (2d) 151, is cited as one following the above rule. The Grand River Drainage District acquired land at tax sales and the taxing authorities attempted to impose and collect ad valorem taxes on this land because it was not used for drainage district purposes. The court in that case went into the question of the reason for acquiring land and the use to which it was put and held that it was not subject to taxation citing the constitutional provision hereinbefore set out.

In the case of State ex rel. John Mills, Collector of the City of Aurora vs. Fleming et al., 275 Mo. 509, the principle was applied that where a flat exemption is made on account of ownership of property that the exemption does not depend on what use such property may be put.

We think the principle as stated in Am. Jur. Vol. 51, page 559, Section 570, is applied in Missouri. This reads as follows:

"Property owned by the state or subordinate

municipal bodies is expressly exempted from taxation by constitutional provision or statutory enactment in many jurisdictions. In such instances, although there is authority otherwise, the prevailing rule is that where the exemption is express and unqualified, no tax can be levied against it, regardless of the use to which it is put. According to this doctrine, where a tax exemption is directed solely to the 'ownership' of public property, the use to which such property is put is immaterial. Under a constitutional exemption of such property 'as may belong to' the state, a mortgage to the regents of the state university was held exempt. A building owned by a municipality and operated as a dispensary of municipally owned liquors has been held public property which could not be taxed under a statute exempting 'all public property,' even though it was used for the purpose of producing income."

CONCLUSION

Under these authorities the lands which the City of Kansas City owns and which are located in Platte County are not subject to taxation even though such lands are used for farming purposes.

Respectfully submitted,

TYRE W. BURTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

TWB:mw

TAXATION: Property not presently used for charitable or religious purposes not entitled to exemption from taxation.

November 16, 1948

FILED

97

11-24
Mr. Robert P. C. Wilson, III
Prosecuting Attorney
Platte City, Missouri

Dear Mr. Wilson:

We have received your request for an opinion of this department, which request is as follows:

"Enclosed find certified copies of a Declaration of Trust and a Deed, both of which relate to certain real property located in Platte County, Missouri. It is the position of the grantees in this deed that it is exempt from taxation by the state. I respectfully request the opinion of your department as to whether or not this land is exempt.

"For your further information, there are no religious structures on the premises and no religious activity is engaged in on the premises. At this time it is being operated solely as a farm, i.e. crops are in cultivation and stock is being raised, the farming activities being carried on by tenants."

In brief summary, the Declaration of Trust expresses a purpose of establishing a foundation to provide clergy and other workers of the Protestant Episcopal Church, and other church bodies, with practical experience in farming operations in order to train them in carrying on church work in rural and farming communities. To carry out this purpose, the donors, Wilbur A. Cochel and Carolyn F. Cochel, his wife, have conveyed to trustees a three hundred and twenty acre farm, on which the practical training is to be received. The donors have reserved the right to erect and pay for a house on said farm where they may live for the remainder of their lives, "to the end that said Wilbur A. Cochel may, under the authority and control of the trustees, supervise the operation of the farming activities upon said farm for his life * * *."

The instrument further provides that the trustees shall have full power to employ as manager for said farm a person experienced in farming operations and to allow him such compensation as they deem proper. The instrument expressly provides that all monies made from the operation of the farm shall belong to the trustees as a part of the trust estate, to be used solely for the purpose of the trust.

Section 6, Article X of the Missouri Constitution, 1945, contains the following provision:

"All property, real and personal, of the state, counties and other political subdivisions, and non-profit cemeteries, shall be exempt from taxation; and all property, real and personal, not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies may be exempted from taxation by general law. All laws exempting from taxation property other than the property enumerated in this article, shall be void."

Pursuant to this constitutional provision the Legislature enacted the following statute, (Laws 1945, page 1799, Section 5):

"The following subjects shall be exempt from taxation for state, county or local purposes: * * * Sixth, all property real and personal actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable, and not held for private or corporate profit shall be exempted from taxation for state, city, county, school, and local purposes; provided, however, that the exemption herein granted shall not include real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom be used wholly for religious, educational, or charitable purposes."

The rule is well-established in this state that exemptions from taxation must be given a strict, although reasonable, construction. *Young Women's Christian Association vs. Baumann*, 344 Mo. 898, 130 S.W.(2d) 499; *State ex rel. St. Louis Young Men's*

Christian Association vs. Koen, 320 Mo. 1172, 11 S.W.(2d) 30.

Furthermore, the burden of establishing the right to exemption from taxation is upon the party claiming the exemption. National Cemetary Association of Missouri vs. Benson, 344 Mo. 784, 129 S. W. (2d) 842.

Although in some states, under particular constitutional or statutory provisions, ownership by a religious or educational organization is a sufficient basis for exemption of property from taxation (51 Am. Jur Taxation, Section 612, page 590), it is clear under the constitutional and statutory provisions in this state that use of the property is the deciding factor, once the non-profit nature of the enterprise has been established. The courts of this state have held that the exclusive use required has reference to a primary and inherent use as over against a mere secondary and incidental use. Salvation Army vs. Hoehn, 188 S.W.(2d) 286.

According to the information which you have supplied there are, at present no religious structures on the premises and no religious activities engaged in on the premises. The property is being operated solely as a farm with crops in cultivation and stock being raised, the farming activities being carried on by tenants.

In view of the fact that the property is now being so used we feel that it should not now be exempt from taxation because there is no showing that it is being used for any purpose set out in either the Constitution or statute as a basis for exemption. The fact that it might be so used at some time in the future is not sufficient to justify an exemption at present, the general rule being that a mere prospective use of property for religious or charitable purposes does not exempt it from taxation. Sioux Falls Lodge vs. Mundt, 37 S.D. 97, 156 N.W. 799; Annotation, 2 A.L.R. 545.

Whether or not, should the program contemplated by the Declaration of Trust be put into effect in the future, the property would be exempt from taxation cannot, we feel, be decided at the present time, as it will be a matter of fact to be determined when the actual method of operation is known. The actual use would then be the decisive question and the provisions of the declaration of trust would not be conclusive as to the nature of the enterprise any more than the purposes set out in a corporation's charter are conclusive as to its charitable nature. See Missouri Goodwill Industries vs. Gruner, 210 S. W. (2d) 38, 39.

Mr. Robert P. C. Wilson, III -4-

CONCLUSION

Therefore, we are of the opinion that property conveyed to trustees for the purpose of establishing a foundation for training clergy in practical farming operations and which is now being used solely for the operation of farming is not presently entitled to be exempt from taxation under the provisions of Section 5, Article X of the Missouri Constitution of 1945 and Laws of Missouri 1945, page 1799, Section 5.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

RRW:mw

STATE BOARD OF OPTOMETRY:
ADVERTISING:

The advertisement of optometric services on credit is the advertisement of "prices or terms for optometric services" under Section 10121 (g), R. S. Mo., 1939, as amended.

(COPY)

Filed: #98

January 6, 1948



Dr. George A. Winterer
202 N. 7th Street
St. Louis, Missouri

Dear Sir:

This is in reply to your request for an opinion of this department, which request is as follows:

"As a member of the State Board of Optometry in Missouri I would appreciate very much your legal opinion as to the meaning of the words 'Terms' and 'Credit'. I am asking this to clarify the differentiation between the two words as far as using them in optometric or optical advertising. It is of some individual's opinion that they mean the same and others say it is a distinct difference. Any help you can give me in this matter will be appreciated by me as well as the other members of the Board."

Section 10121, R. S. Mo. 1939, as amended Laws of 1947, page 415, contains the following provision:

"The State Board of Optometry may either refuse to issue, or may refuse to renew, or may suspend, or may revoke any certificate of registration for any one, or any combination, of the following causes:

* * * * *

"(g) Advertising, directly or indirectly, prices or terms for optometric services."

In construing this statute, the words used should be given their meaning in common usage, unless by doing so a result contrary to the intention of The Legislature and to the purpose of the statute would be produced. *Artophone Corporation v. Coale*, 345 Mo. 344, 133 S. W. (2d) 343.

Dr. George A. Winterer

Webster's New International Dictionary defines the word "terms" as:

"Propositions, limitations, or provisions, stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement; conditions; as, the terms of a sale; hence, specif., stipulations regarding payment, price, or wages; as, terms cash."

When used in connection with prices or conditions of payment, the courts have held that the word "terms" means the time and manner of payment. *Nakdimen v. Ft. Smith and Van Buren Bridge District*, 115 Ark. 194, 172 S.W. 272; *Carson v. Smith*, 5 Minn. 78. Such definition would seem to carry out the intention of the Legislature in adopting the section in question, the apparent intention being to prevent reference in advertising to either the price or the manner of payment for optometric services.

CONCLUSION

The advertisement of optometric services on credit is the advertisement of "prices or terms for optometric services" under Section 10121 (g), R.S. Mo., 1939, as amended.

Respectfully submitted,

ROBERT R. WELBORN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
Attorney General

Quinn
TOWNSHIPS: If proper petition is presented to county court
ELECTIONS: requesting submission of the proposition of
adoption of township organization at general
election, subsequent to election at which town-
ship organization was voted out, question of
adoption must be submitted to voters at next
general election.

July 20, 1948

FILED

99

7.21
Honorable H. B. Worley
Presiding Judge
Daviness County Court
Gallatin, Missouri

Dear Sir:

This is in reply to your letter of recent date requesting
an official opinion of this department, and reading as follows:

"This county voted out Township organiza-
tion in the fall of 1946. I understand
that there are several petitions being
circulated requesting the County Court
to have it brought to a vote again this
fall in order to try and vote the county
back to Township organization.

"I would like to have your opinion as to
whether or not the County Court is re-
quired to submit this question to a vote
so soon after the other election, pro-
viding the petitions are filed."

Section 13931, Laws of Missouri, 1945, page 1972, provides,
in part, as follows:

"Upon petition of at least one hundred
qualified electors of any county of the
third or fourth classes praying there-
for, which said petition shall be filed
in the office of the clerk of the county
court, the county court of such county
shall, by order of record, submit the
proposition of the adoption of township
organization form of county government
to a vote of the electorate of the
county at a general election. If such
petition shall be filed sixty days or

more prior to a general election, the proposition shall be submitted at said general election; if filed less than sixty days before such election, then the proposition shall be submitted at the general election next succeeding said general election. * *"

From the plain, clear and unambiguous language of the section above quoted it is evident that if a proper petition asking for the submission of the proposition of the adoption of township organization in Daviess County is filed in the office of the clerk of the county court sixty days or more prior to the general election to be held in November of this year, such proposition must be submitted to the voters of Daviess County at the general election to be held next November. There is no provision in any law preventing the question of adoption of township organization in the county at any general election when a proper petition requesting such submission is filed in the office of the county clerk.

Conclusion.

It is the opinion of this department that if a proper petition asking for the submission of the proposition of adoption of township organization is filed in the office of the county clerk of Daviess County more than sixty days prior to the November election, such proposition must be submitted to the voters at such election.

Respectfully submitted,

C. B. BURNS, JR.
Assistant Attorney General

APPROVED:

J. E. TAYLOR 
Attorney General

CBB:ml

*Copy to
Geo. Johnson*

SCHOOLS: Money from sale of buildings bought with unappropriated funds by state teachers college need not be deposited in the State Treasury.

January 28, 1948

FILED

100

43

Mr. Roland A. Zeigel
Secretary
Board of Regents
Northeast Missouri State Teachers College
Kirksville, Missouri

Dear Sir:

We have your letter of recent date which reads as follows:

"The Northeast Missouri State Teachers College, at Kirksville, Missouri, requests your opinion relative to the following, to-wit:

Recently said college owned and controlled property was requested by the college to be sold by the State Purchasing Agent of the State of Missouri as surplus property.

The occasion for this request and sale being that said property, consisting of dwelling houses, be sold to private persons in order that said dwelling houses be cleared off the land which is the site for a proposed college owned and operated dormitory.

Said properties were sold by said State Purchasing Agent as requested as surplus property, and the money received by him amounted to \$2,021.00, which said sum was by said State Purchasing Agent turned to the Department of Revenue, which in turn is tendering the money to the State Treasurer as General Revenue.

For your information, the properties sold as surplus, together with the real estate said properties were situated on, were purchased and procured by the college with funds not appropriated to said college by

the State of Missouri or any agency thereof, but with unappropriated funds belonging to said State Teachers College. It is the contention of the college that the funds realized from the sale of said properties by said State Purchasing Agent still belong to the college and should not be permitted to go into the General Revenue Fund of the State of Missouri, but should by the State Treasurer, or other appropriate officers of the State of Missouri, be delivered to said Northeast Missouri State Teachers College in order that said funds might be spent by said Teachers College on the said dormitory construction project.

Your opinion on this question for the guidance of the State Treasurer and other officials, together with the Northeast Missouri State Teachers College, is hereby sought."

The Department of Revenue apparently construes the law to be that the funds you mentioned in your letter are state moneys and should be turned into the State Treasury in accordance with the provisions of Section 15 of Article IV of the Constitution of 1945 and Section 36 of Article III of said constitution. Section 15 of Article IV of the Constitution reads in part as follows:

"The state treasurer shall be custodian of all state funds. All revenue collected and moneys received by the state from any source whatsoever shall go promptly into the state treasury, and all interest, income and returns therefrom shall belong to the state."

Section 36 of Article III reads in part as follows:

"All revenue collected and money received by the state shall go into the treasury and the general assembly shall have no power to divert the same or to permit the withdrawal of money from the treasury, except in pursuance of appropriations made by law. ***"

To determine your question it thus becomes necessary to determine whether the money derived from the sale of the buildings mentioned in your letter constitutes "revenue collected and moneys received by the state

from any source whatsoever."

The only case we have been able to find in which the courts have decided a similar question is the case of State ex rel. Thompson v. Board of Regents for Northeast Missouri State Teachers College, 264 S.W. 608, 305 Missouri, 57. In that case the Board of Regents had purchased insurance policies upon buildings belonging to the college and had paid for said policies out of funds not appropriated by the Legislature for the support of said college. A loss had occurred under said policies, and the Board of Regents had collected damages from the insurance company, and the State Treasury was seeking to compel the Board of Regents to pay the proceeds of said insurance policies into the State Treasury. The Constitution at that time contained provisions almost identical with those above quoted so that the reasoning of the Court in that case would be applicable to the present situation insofar as the two constitutional provisions are concerned. In discussing the provision of the Constitution of 1875 which is almost identical with Section 15 of Article IV of the Constitution of 1945, the Supreme Court said, 264 S.W., 1.c. 699:

"This provision, it will be seen from its terms, which are wisely chosen as a limitation upon power, is restricted to 'revenue collected and money received by the state from any source whatsoever.' By revenue, whether its meaning be measured by the general or the legal lexicographer, is meant the current income of the state from whatsoever source derived which is subject to appropriation for public uses. This current income may be derived from various sources, as our numerous statutes attest, but, no matter from what source derived, if required to be paid into the treasury, it becomes revenue or state money; its classification as such being dependent upon specific legislative enactment, or, as aptly put by the respondent, state money means money the state, in its sovereign capacity, is authorized to receive, the source of its authority being the Legislature. With this limitation--and the Constitution itself is but an instrument of limitations--it should be strictly construed.

Thus construed, the spirit which prompted the adoption of the provision is fully recognized and its purpose is promoted. Unless, therefore, it can be successfully contended, in harmony with well-recognized rules of interpretation, that the board of regents of the college is the state, and that moneys received by it other than from appropriations is state money, the constitutional provision will afford no support to the relator's contention.

While the board, in a sense, represents the state in the performance of its duties, it is but one of the many necessary instrumentalities through which the former is enabled to act within the scope of the powers conferred by law. These powers embody no attributes of sovereignty which would entitle them to be designated as the state's alter ego. While in a sense the board is an agent of the state with defined powers, the importance of its duties with their attendant responsibilities, is such as to necessarily clothe the board with a reasonable discretion in the exercise of same. This is inevitably true, first, because of the difficulty in framing a statute with such a regard for particulars as to cover every exigency that may arise in the future; and, second, because a restriction of the board's powers to the letter of the law would destroy its efficiency, and to that extent cripple the purpose for which the institution was created. Legislatures, therefore, moved by that wisdom which is born of experience, whether conscious or not of that aphorism that 'new occasions teach new duties; time makes ancient acts uncouth,' have contented themselves with defining in general terms the powers of such boards as are here under review, leaving the discharge of duties not defined, and which may, under changed conditions, arise in the future, to the discretion of the board."

After the above discussion the court went on to discuss the operations of the Board of Regents and especially their operations under implied powers. The Court concludes that the Board of Regents had implied powers to use their discretion in many of the business affairs of the institution. Further in the opinion the Court said, 264 S.W. L.c. 701:

"In the foregoing discussion of the constitutional provision invoked by relator, we have stated generally that no statute required the payment into the state treasury of the money here in controversy, and that a statutory enactment was a prerequisite to such payment and its receipt and deposit by the treasurer to entitle it, under the Constitution, to be classified as state money."

Likewise, there is no statute on the books now which requires the particular funds you mentioned in your letter to be paid into the State Treasury, and under the reasoning in the case above discussed, such funds would not, therefore, be state money nor would they be "revenue collected" by the state. To support its reasoning in the above mentioned case, the Supreme Court then discussed various statutes governing the Board of Regents of the college. One of the statutes discussed was Section 11505, R. S. Mo. 1919, which was almost identical with what is now Section 10767, p. 1685, L. 1945, which later section now reads as follows:

"The president of each board shall make an annual report to the state board of education, in the month of August in each year, of all receipts of moneys from appropriations, incidental fees, and all other sources, and the disbursements thereof, and for what purposes, and the condition of said college."

Said section impliedly gave the Board of Regents power to hold and disburse the insurance funds without their being first deposited in the State Treasury. Said section refers to moneys "from appropriations, incidental fees, and all other sources". (Underscoring ours).

Likewise, Section 10768, p. 1685, L. 1945, provides for a treasurer for the Board of Regents and prescribes his duties as follows:

"The treasurer of each board shall receive, keep and disburse all moneys under the control of the board of his district, and perform all such acts as appertain to his office, under the direction of the board, and make reports of the same to the board at its annual meeting. The treasurer of each board shall also make and furnish to the state board of education in the month of August of each year, an abstract which shall contain a full account of all moneys received and disbursed by his college during the preceding year, stating from what source received and on what account paid out, and the amount paid to each professor, teacher or other officer of the college; and said treasurer shall every two years report to the general assembly, under oath, an itemized statement of all receipts and expenditures for the two calendar years preceding, showing minutely all disbursements of money received from the state or other sources, and said college shall not be entitled to any appropriation unless such statement is so made."

Section 10768, supra, likewise implies that the Board of Regents will receive other moneys than those appropriated by the Legislature. Of course, if the constitutional provisions above quoted require the funds in question to be paid into the state treasury, Sections 10767 and 10768, supra, would be invalid insofar as they conflict with such constitutional provisions. However, under the reasoning in the Thompson case, said funds are not such as are required to be paid into the State Treasury, and Sections 10767 and 10768 of the statutes merely amount to an interpretation by the Legislature of the constitutional provisions above referred to to the effect that only current revenue and money received directly by the state are required to be paid into the State Treasury. The buildings which were sold under the circumstances you mentioned were not purchased out of money appropriated by the Legislature, but were purchased by some funds which the Board of Regents had in its hands from some other source. The Board of Regents will, of course, be required under Sections 10767 and 10768 to account for the proceeds of the sale of said buildings in its reports. If the General Assembly is not satisfied with the way unappropriated funds are thus being handled, it can pass such laws as it thinks advisable

under the circumstances. Up to now it appears that the Legislature has for more than one-half a century consented to the Board of Regents of the college handling some funds independently of the State Treasury.

Conclusion

It is, therefore, the opinion of this office that the proceeds of the sale of buildings purchased by the Board of Regents of the Northeast Missouri State Teachers College with funds not appropriated to said college by the Legislature are not required to be turned into the State Treasury, but may be kept and disbursed by the Board of Regents of said college.

Yours very truly,

Harry H. Kay
Assistant Attorney General

APPROVED:

J. E. Taylor
Attorney General

HHK/vlv